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SUPREME COURT, U.S.

No. 83-5528

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN THE INTEREST OF BABY GIRL K,
A PERSON UNDER THE AGE OF 18;

BRYON BUHSE, Appellant,

v.

LISA KRUEGER, Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

JURISDICTIONAL STATEMENT

Gerhardt F. Getzin
Getzin & Jannetta
408 Third Street, Suite 307
P. O. Box 3005
Wausau, WI 54401-8205
Telephone: (715)842-0823

Counsel for Appellant

September 28, 1983

TABLE OF CONTENTS

Table of Citations ii

Jurisdictional Statement 1

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Constitutional Provisions and Statute 2

Raising the Federal Question 3

Parties to the Proceedings Below 3

Statement of the Case 4

The Questions are Substantial

I. Wis. Stat. s. 48.415(6)(a)2 Violates the Equal Protection Clause to the Fourteenth Amendment of the United States Constitution 7

II. A Father's Fundamental Rights to Parenting are Violated Under the Due Process Clause if His Parental Rights Can Be Terminated for Not Establishing a Parental Relationship During the First Five Months of Pregnancy 9

III. A Finding of Parental Unfitness is Necessary in Order to Protect the Unwed Father's Rights Under the Due Process Clause 12

Conclusion 13

Appendix A - Wisconsin Supreme Court Opinion

Appendix B - Wisconsin Court of Appeals Decision

Appendix C - Marathon County Circuit Trial Court Findings

Appendix D - Notice of Appeal

Appendix E - Declaration of Parental Interest

TABLE OF CITATIONS

Cases:

Alsager v. District Court of Polk County, 406 F. Supp. 10 (S.D. Iowa C.D. 1975)	9,10,11
Caban v. Mohammed, 441 U.S. 384 (1979)	7,8
In the Interest of Baby Girl K, 113 Wis. 2d 429, _____ N.W.2d _____ (1983)	Passim
Lehr v. Robertson, _____ U.S. _____ (1983)	8,12,13
Quilloin v. Walcott, 434 U.S. 246 (1978)	13
Santosky v. Kramer, _____ U.S. _____, 102 S.Ct. 1388 (1982)	11
Stanley v. Illinois, 405 U.S. 645 (1972)	9
United States Constitution, Fourteenth Amendment	Passim

Statutes:

Wis. Stat. Section 48.415	Passim

JURISDICTIONAL STATEMENT

Bryon Buhse, the appellant, appeals from the final judgment of the Supreme Court of the State of Wisconsin, dated July 1, 1983, affirming the termination of his parental rights to the child concerned and holding that Wisconsin Statutes section 48.415(6)(a)2, as applied in this case, is constitutional since it does not violate appellant's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and holding that appellant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution were not violated.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Wisconsin, entered July 1, 1983, which appears in Appendix A, is reported at 113 Wis. 2d 429, ___ N.W.2d ___ (1983).

The Supreme Court of the State of Wisconsin in its July 1, 1983, opinion affirmed the opinion of the Wisconsin Court of Appeals District III dated August 17, 1982. The Court of Appeals' opinion was not published, and a copy appears in Appendix B.

The findings of fact and judgment of termination of parental rights of the Marathon County Circuit Court of the State of Wisconsin are not reported, and copies are attached in Appendix C.

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin affirming the termination of appellant's parental rights in the child concerned was entered on July 1, 1983.

A notice of appeal to this Court was duly filed in the Supreme Court of the State of Wisconsin on July 30, 1983. See Appendix D.

This appeal is being filed for docketing in this Court within 90 days from the entry of judgment in the Wisconsin Supreme Court. Rule 28.2. The jurisdiction of this Court is invoked under 28 U.S.C. s. 1257(2).

QUESTIONS PRESENTED

1. Does Wisconsin Statutes section 48.415(6)(a)2 violate the Equal Protection Clause to the Fourteenth Amendment to the United States Constitution since it unjustly discriminates against unwed fathers?

2. Does Wisconsin Statutes section 48.415(6)(a)2, as applied, violate the rights of unwed fathers under the Due Process Clause to the Fourteenth Amendment to the United States Constitution since it was held that a father's rights can be terminated for action or nonaction during the first five months of the mother's pregnancy?

3. Were appellant's rights under the Due Process Clause to the Fourteenth Amendment to the United States Constitution violated by the judgment of termination of his parental rights since no finding of parental unfitness was made?

CONSTITUTIONAL PROVISIONS AND STATUTE

Fourteenth Amendment, United States Constitution:

Section 1...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statutes Section 48.415(6)(a)2:

...Grounds for termination of parental rights shall be one of the following: ...(6) Failure to assume parental responsibility. (a) Failure to assume parental responsiblity may be established by a showing that a child has been born out of wedlock, not subsequently legitimated or

adopted, that paternity was not adjudicated prior to the filing of the petition for termination of parental rights and: ... (2) That although paternity to the child has been adjudicated under s. 48.423, the father did not establish a substantial parental relationship with the child prior to the adjudication of paternity although the father had reason to believe that he was the father of the child and had an opportunity to establish a substantial parental relationship with the child.

• • • •

RAISING THE FEDERAL QUESTION

The constitutional questions were not raised before the trial court.

The constitutional issues presented in this matter were raised and decided for the first time before the Wisconsin Court of Appeals. Likewise, the Wisconsin Supreme Court reached all of the constitutional issues raised in this matter. The Wisconsin Supreme Court considered and expressly rejected the appellant's federal constitutional claims.

• • • •

PARTIES TO THE PROCEEDINGS BELOW

The following are the parties who participated in the proceedings before the Wisconsin Supreme Court:

Bryon Buhse, father of the child concerned, represented by Atty. Gerhardt F. Getzin, Getzin & Janetta, 408 Third Street, Suite 307, P. O. Box 3005, Wausau, WI 54401-8205.

Lisa Krueger, mother of the child concerned, represented by Atty. Patrick M. Brady, Bradley, Brady & Hoover, 107 Sixth Street, P. O. Box 898, Wausau, WI 54401.

Baby Girl K, child concerned, represented by her Guardian ad Litem, James Kurth, Attorney at Law, 128 Grand Avenue, P. O. Box 1547, Wausau, WI 54401.

28 U.S.C. s. 2403(b) may be applicable in this matter. Service of this Jurisdictional Statement has therefore been made on Bronson LaFollette, Wisconsin Attorney General, State Capitol, Madison, WI 53702.

STATEMENT OF THE CASE

On March 17 1981, Baby Girl K was born to L.K., appellee in this matter, in Wausau, Wisconsin. The parents of the child were not r ried. B.B., appellant in this matter, the father of the child, was incarcerated in November of 1980, about five months into the pregnancy of Baby Girl K.

At the time B.B. was initially imprisoned, he and the mother had plans to marry. L.K. changed her mind about marriage after B.B. was incarcerated and before the child was born. The child was placed in a foster home immediately after birth. The Marathon County Department of Social Services filed a petition for termination of parental rights of both parents in the Marathon County Circuit Court on March 25, 1981. On April 13, 1981, B.B. filed a declaration of parental interest with the Wisconsin Department of Health and Social Services. See Appendix E.

B.B. did not consent to the termination of his rights, and the first petition was subsequently dismissed. A petition for determination of paternity and custody was filed on August 3, 1981, in the Marathon County Circuit Court by B.B. A petition for determination of the status of the child alleged to be in need of protection and services (hereinafter referred to as "CHIPS proceedings") was then filed August 4, 1981, by the Marathon County Department of Social Services. B.B. appeared in the CHIPS proceedings and let it be known that he was recommending to the court that the child be placed with B.B.'s mother's family. On August 13, 1981, L.K. filed a petition for termination of parental rights of B.B. under Wisconsin Statutes section 48.415(6)2. The legal actions included: the action for determination of paternity, an action for custody by B.B. in his petition for determination of paternity, the CHIPS proceeding, and the action for

termination of B.B.'s parental rights. These actions were consolidated into one case in the Marathon County Circuit Court.

On December 23, 1981, the trial court granted B.B.'s motion for summary judgment and adjudged him the father of the child. Immediately thereafter, a hearing was held on the petition for termination of parental rights. In support of her petition to terminate these rights L.K. contended and the trial court found that B.B. did not contribute to the expenses of the preganancy before he was incarcerated and that on one occasion L.K. was physically assaulted by B.B. while pregnant.

The mother also testified that: B.B. did have a concern for mother and child both during and after the pregnancy; B.B. was happy when he learned of the pregnancy and spent every day with the mother until his incarceration; B.B. and L.K. had plans to marry until L.K. changed her mind about the marriage and decided the child should be put up for adoption after B.B. was incarcerated; B.B. did pay the dental expenses of the mother during the pregnancy; after he was incarcerated, L.K. wrote to B.B. telling him not to worry about the expenses of her pregnancy; and it was made known to L.K. that B.B. was willing to provide for both the mother and the child by placement in B.B.'s mother's home until he was released. After the child's birth, B.B. wrote to the foster parents, the trial judge and the Marathon County Department of Health and Social Services requesting photographs and information on the child's placement and welfare and expressing his intent to have the child placed with his mother's family until he was released and could care for the child himself. On one occasion while the action was pending, the trial judge explicitly rejected B.B.'s attempts to communicate with his daughter, stating that such action was premature until paternity was established.

On December 23, 1981, the Marathon County Circuit Court, the Honorable Leo D. Crooks presiding, found that B.B. had failed to assume parental responsibility within the meaning of Wisconsin Statutes

section 48.415(6)2. In its findings of fact, the court found, among other things, that B.B. neglected to provide care or support to L.K. during her pregnancy, even though he had the opportunity and the ability to do so, that he failed to present evidence of any attempts on his part to establish a parental relationship, and that he failed to make any attempt to contribute towards the medical expenses occasioned by the pregnancy and delivery. Trial court issued judgment terminating B.B parental rights to Baby Girl K. See Appendix C.

In his opinion issued from the bench at the conclusion of the December 23, 1981, hearing, Judge Crooks found that, "Admittedly, [B.B.] did not have the opportunity to exercise 'significant responsibility' but he did accept that he was the father, that [B.B.] expressed an interest for both the child and the mother and that he intended to marry her."

No findings were made by the trial court regarding parental unfitness of B.B.

B.B. appealed the judgment of termination of his parental rights to the Wisconsin Court of Appeals which affirmed the trial court on August 17, 1982. B.B. then petitioned for review to the Wisconsin Supreme Court which issued its decision on July 1, 1983.

Although appellant did not raise any constitutional objections to the petition for termination in the trial court, he did raise constitutional objections, contained in the questions presented to this Court, on appeal. The Wisconsin Supreme Court decided these issues. In Wisconsin, consideration of a constitutional issue raised for the first time on appeal is discretionary with the appellate courts. The courts will consider the issues if it is in the best interests of justice to do so, if both parties have had the opportunity to brief the issue, and if there are no factual issues that need resolution. The Wisconsin Supreme Court exercised its discretion to consider the issues and did so. See Appendix A, page 19.

THE QUESTIONS ARE SUBSTANTIAL

I. WIS. STAT. S. 48.415(6)(a)2 VIOLATES THE EQUAL PROTECTION CLAUSE TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

This Court has recognized that gender-based distinctions must serve important governmental objectives and must be substantially related to achievement of those objectives in order to withstand judicial scrutiny under the Equal Protection Clause. Caban v. Mohammed, 441 U.S. 4, 393 (1979). In Justice Abrahamson's dissent issued in the Wisconsin Supreme Court opinion below, Chief Justice Beilfuss and Justice Heffernan joining, it was stated, "Everyone agrees that Wis. Stat. s. 48.415(6)(a)2 treates unmarried parents differently according to their gender." Justice Abrahamson goes on in her dissent to give a detailed history of this Court's decisions regarding Equal Protection issues in cases involving unwed fathers. Justice Abraham concludes, as was argued by appellant in his brief in the Wisconsin Supreme Court, that biological differences alone are not sufficient justifications for this gender-based statute.

Since another subsection of the statute in question, Wis. Stat. s. 48.415(6)(a)1, provides for circumstances in which there are difficulties in ajudication of paternity, the only reasons left for support of gender-based distinctions in the statute in question are overly broad gender-based justifications. No other justification has ever been raised as to why this statute should not be applied to unwed mothers as well as unwed fathers. Again, Justice Abrahamson in her dissenting opinion eloquently speaks to the point of improper gender distinction at the base of this statute:

> Biology dictates only that a woman carry a child. It does not dictate that she show responsibility by providing proper care for herself (and thus the unborn child) or even that she love the child. The mother has control over prenatal care which, as the majority recognizes, is 'important to the eventual health and well-being of an infant.' ... A woman can disregard the care and protection of the child during pregnancy by ignoring the importance of proper nutrition, medical care, and exercise, by smoking or ingesting dangerous drugs, by overuse of caffeine and alcohol, by gaining too much or too little weight, by exposing herself to hazardous environmental elements, or by subjecting herself to stress. A

woman's support and care of an unborn child are voluntary and important. ...

> The majority has generalized that the mother is naturally closer to her child and has the natural obligation to raise the child. In this case, though, the mother's relation to the child during pregnancy was not explored, but we do know that the mother voluntarily decided not to raise the child, placing the child outside her home within three days after its birth, for reasons that may very well stem from her love for the child and her desire to allow it to be adopted. The trial court found as a fact that the "child had no relationship with either parent..." (emphasis added in opinion). Accepting this finding of the circuit court, I must conclude that the mother and father in this case are similarly situated as to the child. Nonetheless, the statute treats the two parents differently, for no apparent reason. If this mother refused to terminate her parental rights voluntarily, involuntary termination proceedings could not be instituted against her on the ground that she failed to establish a substantial parental relationship with the child because the statute does not apply to the unwed mother. When one takes into consideration the father's actual efforts to establish the relationship with the child by initiating paternity proceedings one month after the child's birth and expressing constant interest in the child, it is ironic that he, not the mother, can have his parental rights involuntarily terminated on this ground and without a finding of unfitness."

In Interest of Baby Girl K, 113 Wis.2d 429, 470-71, 473 , ___ N.W. 2d ___ (1983).

It is clear that Lehr v. Robertson, ___ U.S. ___ (1983), does not overrule the holding of Caban v. Mohammed, 441 U.S. 380 (1979) as quoted above. It is extremely important to note that the Wisconsin Statute is significantly different from the statutes in question in Caban and Lehr. More than sufficient protection to enable adoption of children forsaken by their parents is provided in the other grounds for termination of parental rights in Wis. Stat. s. 48.415: abandonment, continuing need of protection or services, continuing parental disability, continuing denial of visitation rights and repeated abuse. If unwed mothers or unwed fathers do not provide substantial parental relationships for children, sufficient protection is provided for adoption of the child throught the grounds of abandonment, continuing need of protection or services or repeated abuse. If it is necessary, in the mind of the Wisconsin legislature, to provide for termination in absence of a substantial parental relationship as defined by the statute, there is

no sufficient reason to discriminate in such a broad gender-based manner against unwed fathers.

II. A FATHER'S FUNDAMENTAL RIGHTS TO PARENTING ARE VIOLATED UNDER THE DUE PROCESS CLAUSE IF HIS PARENTAL RIGHTS CAN BE TERMINATED FOR NOT ESTABLISHING A PARENTAL RELATIONSHIP DURING THE FIRST FIVE MONTHS OF PREGNANCY

The Wisconsin Supreme Court held that Wis. Stat. 48.415 allows for termination of an unwed father's parental rights for failure to establish a substant parental relationship during the first five months of the mother's pregnancy. The appellant argued before the Wisconsin Supreme Court that conduct during gestation may be a factor in determining the nature of the parental relationship; however, to hold that a person's parental rights can be terminated for not establishing a substantial parental relationship before the birth of the child, for five months in this case, would be a construction of the statute that would render it unconstitutional.

It is clear that parental rights are a fundamental interest to be protected under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535 (1942) and [r]ights far more precious...than property rights," May v. Anderson, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166 (1944) The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring].

Stanley v. Illinois, 405 U.S. 645, 652 (1972).

In Alsager v. District Court of Polk County, 406 F. Supp. 10, 15, 16 (S.D. Iowa C.D. 1975), a case dealing with an Iowa parental termination statute, the nature of the fundamental constitutional right was discussed:

A plethora of opinions by the United States Supreme Court, addressed to the nature of constitutional interests implicated where various aspects of family life are threatened, indicate that the Alsagers have a fundamental right to family integrity.

In Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), the Supreme Court upheld the right of parents to have their children taught the German language. The Court determined that the "liberty" guaranteed by the Fourteenth Amendment "without doubt, . . . denotes . . . the right of the individual . . . to marry, establish a home and bring up children." Id. at 399, 43 S.Ct. at 626. Similarly, in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), the Court affirmed the enjoining of an Oregon statute which was deemed to interfere "with the liberty of parents and guardians to direct the upbringing and education of children under their control." Id. at 534-535, 45 S.Ct. at 573. In Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), the Court noted that "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder. . . . And it is the recognition of this that these decisions (Meyer and Pierce) have respected the private realm of family life which the state cannot enter." Id. at 166, 64 S.Ct. at 442.

This "liberty" right was similarly recognized in Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), where the Court emphasized the fundamental nature of the constitutionally protected right to marry and to procreate while invalidating a statute allowing the sterilization of habitual criminals. In May v. Anderson, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953), the Court denied full faith and credit to an ex parte custody decree, noting that the Fourteenth Amendment's liberty included a parent's "immediate right to the care, custody, management and companionship of . . . minor children." Id. at 533, 73 S.Ct. at 843. More recently, in Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974), the Court invalidated mandatory leave provisions for pregnant school teachers because they unnecessarily interfered with the decision to raise a family. The Court observed that the "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Id., 94 S.Ct. at 796, 39 L.Ed.2d at 60.

Other decisions, while premised on a "privacy" rather than a "liberty" rationalae, have shown a similar solicitude for the family enclave. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972). In Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), the Court acknowledged the right to family integrity in declaring Illinois' dependency statute unconstitutional for depriving unmarried fathers of the care and custody of their natural children on the death of their mother. In the words of the Court, "the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." (citations omitted) Id. at 651, 92 S.Ct. at 1213.

> Finally, in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the United States Supreme Court addressed the pertinence of many of its above-mentioned decisions to the abortion context. The Court noted that while privacy is not explicitly mentioned in the Constitution, a right to a "guarantee of certain areas or zones" of privacy includes only those rights that are "implicit in the concept of ordered liberty," such as "activities relating to marriage . . . procreation . . . contraception . . . family relationships. . . and child rearing and education. Id, at 152, 93 S.Ct. at 726 (citations omitted). The Court further stated its belief that the privacy right is "founded in the Fourteenth Amendment's concept of personal liberty." Id, at 153, 93 S.Ct. 727.
>
> The inescapable conclusion arising from the foregoing authorities is that the Alsagers possess a fundamental "liberty" and "privacy" interest in maintaining the integrity of their family unit. See generally, Note, Parental consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy, 88 Harv.L.Rev. 1001, 1014-15 (1975). It is this fundamental right to family integrity, protected by the Due Process Clause of the Fourteenth Amendment, which is menaced by Iowa's parental termination statute.

Recently the United States Supreme Court reaffirmed the importance of and protection given to parental rights in Santosky v. Kramer, ___ U.S.___, 102 S.Ct. 1388, 1394 (1982):

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.

This Court should note that the trial court which terminated the parental rights of the appellant found from the bench immediately after the hearing that, "Admittedly, Mr. B. did not have the opportunity to exercise 'significant responsibility' but he did accept that he was the father," that Mr. B. expressed an interest for both the child and the mother, and that he intended to marry her. Record 70, p. 51. Despite this finding, the trial court and the Wisconsin Supreme Court have seen fit to establish a rule of law in this case that a father's action prior to the birth of his child may form a sufficient basis to conclude that he had an "opportunity" to establish a substantial

parental relationship with the child. In the Interest of Baby Girl K, 113 Wis. 2d 429, 438, _____ N.W.2d _____ (1983). Such a holding is contrary to the constitutional protection afforded to parental rights.

This Court should take plenary consideration of this issue since the holding of Lehr needs to be clarified as applied to the circumstances of Wis. Stat. s. 48.415(6)(a)2.

It is true as the majority opinion in Baby Girl K, 113 Wis. 2d 249 at 445 states that this Court in Lehr noted that there is a "clear distinction between a mere biological relationship and an actual relationship of parental responsibility." Does the holding in Lehr mean that an unwed father does not have any more than five months during the pregnancy of the mother to establish a substantial parental relationship? The Wisconsin Supreme Court so held. That holding simply cannot pass this Court's inspection without full consideration of this extremely important issue through the submission of briefs and oral argument.

III. A FINDING OF PARENTAL UNFITNESS IS NECESSARY IN ORDER TO PROTECT THE UNWED FATHER'S RIGHTS UNDER THE DUE PROCESS CLAUSE

The unwed father's parental rights in this matter were terminated for failing to establish a substantial parental relationship without any finding of parental unfitness made by the trial court. Not only did the Wisconsin Supreme Court find that a father's action prior to the birth of his child may form a sufficient basis to conclude that he had opportunity to establish a substantial parental relationship but it also concluded that no finding of parental unfitness was necessary. In the Interest of Baby Girl K, 113 Wis. 2d 429, 438-39, _____ N.W.2d _____ (1983).

Again, this Court has the benefit of an eloquent dissenting opinion on this issue. Chief Justice Bruce Beilfuss, with Justices Heffernan and Abrahamson joining in dissent, provide a detailed history of cases regarding the fundamental interests of parents in their children which

is protected by the due process clause of the Fourteenth Amendment to the United States Constitution. Baby Girl K, at 451-463.

Chief Justice Beilfuss notes that the majority opinion held that the due process clause does not require a finding of unfitness before termination and that the majority placed its reliance on Lehr v. Robertson, _____ U.S. _____ (1983). As noted by the Chief Justice, the New York statutory scheme under review in Lehr has absolutely no similarity to W Stat. s. 48.415(6)(a)2, "and thus Lehr at best has only very limited applicability to the instant case." Id at 458.

In both Lehr and Quilloin v. Walcott, 434 U.S. 246 (1978), it was apparent that the fathers whose rights were terminated did not have any significant relationship with the child. In Lehr the father did not attempt to establish a legal tie with the child until after the child was two years old. Lehr, _____ U.S. _____, Slip op. p. 14. In Quilloin the father was attempting to block adoption after eleven years of failing to attempt to establish any legal tie with the child. Quilloin, at 249.

Although it is clear that proper protection must be given to illegitimate children in order to insure they are adopted when appropriate, this Court must carefully scrutinize instances where states terminate a parent's fundamental interest in his child without requiring a finding of parental unfitness. It is clear that the due process clause provides substantial protection to a parent's interest. Where a parent has come forth and asserted his parental interest by filing a declaration of parental interest before the child is even born, where he has filed an action to establish his own paternity, and where he has filed a motion for custody of the child, the due process clause should not allow for a summary disposition terminating his parental rights based on a period of five months during the mother's pregnancy.

CONCLUSION

The appellant in this matter urges this Court to carefully read the majority opinion and the two strong dissenting opinions issued by a

closely divided Wisconsin Supreme Court. A decision which interprets a state statute not to be in violation of the equal protection and due process clauses when a parent's rights have been terminated because of his gender and because of actions or nonactions during the first five months of pregnancy presents very substantial questions which this Court should closely inspect upon briefing and oral argument.

Respectfully submitted,

GETZIN & JANNETTA

BY:

Gerhardt F. Getzin
Counsel for Appellant
408 Third Street, Suite 307
P. O. Box 3005
Wausau, WI 54401
Telephone: (715)842-0823

September 28, 1983

APPENDIX A

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 82-087

STATE OF WISCONSIN : IN SUPREME COURT

IN THE INTEREST OF BABY GIRL K.,
a person under the age of 18:

L.K.,

Petitioner-Respondent-Petitioner,

v.

B.B.,

Respondent-Appellant.

FILED

JUL 1 1983

MARILYN L. GRAVES
CLERK OF SUPREME COURT
MADISON, WISCONSIN

REVIEW of a decision of the Court of Appeals. AFFIRMED.

DAY, J. This is a review of an unpublished decision of the Court of Appeals which affirmed a judgment of the Circuit Court for Marathon County, Leo D. Crooks, Judge, terminating the parental rights of the father, B.B., to Baby Girl K. under the provisions of §48.415(6)(a)2 and 6(b),[1/] Stats. (1981-82).

There are four issues presented on review. The first issue is: Does §48.415(6)(a)2 permit termination of the parental rights of a father of a child born out of wedlock where the father was incarcerated in the state prison system from the fifth month of the mother's pregnancy?

The second issue is: Was the termination of B.B.'s parental rights under the provisions of §48.415(6)(a)2, Stats. properly ordered here?

The third issue is: Must a specific finding of parental unfitness be made in order to involuntarily terminate parental rights under §48.415(6)(a)2, Stats?

The final issue is: Does §48.415(6), Stats. violate the Equal Protection Clause of the Fourteenth Amendment?

We conclude that the mere fact that the father of the child born out of wedlock has been incarcerated in the prison system since the fifth month of the mother's pregnancy does not preclude possible termination of his parental rights under §48.415(6)(a)2, Stats. We also conclude that due process does not require a finding of parental unfitness where the father has failed to establish a substantial parental relationship under §48.415(6)(a)2. We determine that the trial court properly terminated B.B.'s parental rights under §48.415(6)(a)2, Stats.

Finally, we conclude that §48.415(6)(b)2, Stats. does not violate the Equal Protection Clause of the Fourteenth Amendment.

Accordingly, we affirm the decision of the Court of Appeals.

L.K., Baby Girl K.'s mother, and B.P. began dating in July, 1979. At that time and up through to the birth of Baby Girl K. on March 17, 1981, L.K. was a minor.

In June, 1980, L.K. became pregnant with Baby Girl K. Approximately five months later, in November, 1980, B.B. was convicted of burglary and incarcerated at the Kettle Morraine Correctional Institute. A prior conviction occurred in 1977 when he was convicted of burglary and sent to the Wisconsin State Reformatory.

From June until November, 1980, B.B. continued seeing L.K. According to the testimony of L.K., B.B. did not work but apparently supported himself quite well by dealing in drugs and "robbing places."[2/] During that period of her pregnancy, L.K. stated that B.B. treated her "fairly good" but she recalled an incident where "he picked up my bike and threw it into the road from the porch, and then. . .grabbed me around the neck and tried to strangle me." L.K. also testified that B.B. would use the money from his drug dealing and robberies to "go out to bars and. . .buy drinks for everyone" and to buy marijuana. She noted that "he smoked a fair amount of his money away."

Prior to his incarceration, B.B. did not contribute to defraying the cost of any of L.K.'s pregnancy related expenses although he did pay some of her dental expenses.[3/] After his incarceration, B.B. also made no contribution to her expenses.

However, L.K. testified that she told him not to worry about the expenses while he was in prison. She also testified that B.B. suggested that she and the child go live with his mother after the baby was born.

While in prison, prior to the birth of Baby Girl K., B.B. and L.K. corresponded. In his letters, B.B. twice requested that L.K. come visit him and try to smuggle some marijuana to him. B.B.'s letters also expressed the concern if L.K. gave up the baby for adoption, that might end their relationship.[4/]

Before Baby Girl K.'s birth, B.B. apparently initially consented to having his parental rights terminated. However, as L.K. testified on cross-examination, he changed his mind "right around the time I stopped writing him." It was L.K.'s belief that B.B. wanted the child in order to perpetuate a relationship with her. The record and B.B.'s correspondence with L.K. lend credence to her statement.

B.B. points out that he offered to have L.K. and the child live with his mother and step-father. L.K. refused that offer. A social worker's report which was ordered by the trial court following B.B.'s request for an evaluation of his parents' home showed that B.B. had been removed from that household and placed in a foster home and that later a half-sister had likewise been taken out of the household and placed in a foster home.[5/]

On March 17, 1981, Baby Girl K. was born. L.K. signed a Voluntary Placement Agreement with the Marathon County Department

of Social Services (Department) on March 18, 1981. The purpose of the agreement was to allow Baby Girl K. to be placed in a foster home upon her discharge from the hospital. The placement occurred on March 20, 1981. Baby Girl K. has remained in the same foster home since that date. The foster parents have expressed an interest in adopting her should the parents' rights be terminated.

L.K. initially filed a petition for voluntary termination of parental rights but withdrew it after learning that B.B. would not consent to having his parental rights terminated. B.B. had filed a Declaration of Parental Interest with the Department on April 13, 1981. In June, 1981, L.K. filed a petition requesting that Baby Girl K. be found in need of protection or services and that her custody be transferred to the Department for the purpose of continued foster care placement ("Chips" petition).

On August 3, 1981, B.B. filed a petition for a determination of paternity and custody, and a motion to consolidate these matters with the "Chips" proceeding. Subsequently, L.K. filed a petition for the termination of B.B.'s parental rights under §48.415(6), Stats. All of these actions were consolidated.

On December 23, 1981, the trial court adjudged B.B. the father of Baby Girl K. The court then held a hearing on L.K.'s petition to terminate the parental rights of B.B. The testimony set out above was given at this hearing. In addition, at the

hearing, Baby Girl K.'s guardian ad litem recommended that B.B.'s parental rights be terminated.

Following the hearing, in a decision from the bench, the trial judge ordered B.B.'s parental rights terminated. The court determined that B.B. had "failed to assume parental responsibility as set forth and defined in §48.415(6)(a)2 and subsection (6)(b)," Stats. In so deciding, the court stated:

> "This Court does find that preliminary to his incarceration Mr. [B.B.] was able to provide care and support and failed to do so. This record fails to show that Mr. [B.B.], in any way, attempted to carry on a meaningful relationship which this Court could consider as a substantial parental relationship, even by mail, or by phone, or in any other manner, doing those things that are essential to a substantial parental relationship: expressing concern with small gifts, a card, request that the baby be brought down for a visit, any number of little things that spell the difference between the results of a sexual encounter or a parent-child relationship.
>
> "This Court does believe that in spite of his incarceration Mr. [B.B.] had that opportunity to establish a substantial parental relationship. The legislature has not given us guidelines where they will decide or where they have decided, that "X" number of weeks or months or years constitutes the failure to establish that parental relationship and it is true that Mr. [B.B.] did file the Declaration of Parental Interest as set forth in Exhibit 4. There is no doubt in my mind that he is interested. But, he has failed to carry through on those areas that are essential to establish a substantial parental relationship."

The trial court also made the following written findings of fact and conclusions of law which are pertinent:

FINDINGS OF FACT

> "7. That during the period that petitioner was pregnant with Baby Girl [K.], the respondent, [B.B.], on two occasions, wrote letters to

petitioner asking her to smuggle marijuana into the Kettle Morraine Correctional Facility for his personal use.

"8. That on one occasion during the period that petitioner was pregnant with Baby Girl [K.] the respondent, [B.B.], physically assaulted petitioner.

"9. That the respondent, [B.B.], neglected to provide care or support to petitioner during her pregnancy even though respondent, [B.B.], had the opportunity and ability to do so.

"10. That respondent, [B.B.], failed to present evidence of any attempts on his part to establish a parental relationship with Baby Girl [K.] such as attempts to contact said child, write to persons caring for said child or to send the child cards or gifts.

"11. That respondent, [B.B.], failed to make any attempt to contribute towards the medical expenses of petitioner occasioned by her pregnancy and the subsequent delivery of Baby Girl [K.].

"12. That there is a high degree of likelihood that Baby Girl [K.] will be adopted in the event the parental rights of [B.B.] are terminated.

"13. That Baby Girl [K.] is in good health and at the time of placement of foster care, was only three (3) days old.

"14. That the child has had no relationship with either parent or other family members so that it would not be harmful to said child to sever such relationships.

"15. That in the event the parental rights of [B.B.] are terminated, that the child will be able to enter into a more stable and permanent family relationship.

CONCLUSIONS OF LAW. . .

"16. That respondent, [B.B.], has failed to assume parental responsibility for Baby Girl [K.] within the meaning of Sec. 48.415(6), Wis. Stats.

"17. That it is in the best interest of Baby Girl [K.] that the parental rights of her father, [B.B.], be terminated."

B.B. appealed from the judgment. The Court of Appeals a irmed. That Court concluded that the evidence was sufficient to support a finding that B.B. had an opportunity to develop a substantial relationship with Baby Girl K. and had failed to do so. The Court of Appeals determined that the trial court's finding that the termination of B.B.'s parental rights would be in the best interest of Baby Girl K. was not against the great weight and clear preponderance of the evidence. The court also concluded that a specific finding of parental unfitness was unnecessary to terminate B.B.'s parental rights. However, the court went on to note that even though a finding of unfitness was not required, such a finding "is clearly sustained by the record." Finally, the court held that §48.415(6)(a)2 did not unconstitutionally deny B.B. the equal protection of the law.

The first issue on review is: Does §48.415(6)(a)2, Stats. permit the termination of the parental rights of a father of a child born out of wedlock where the father was incarcerated in the Wisconsin prison system from the fifth month of the mother's pregnancy?

Section 48.415(6)(a)2, Stats. allows the parental rights of a father whose paternity has been adjudicated to be terminated under certain conditions. The conditions exist where a father has not established a substantial parental relationship prior to

the adjudication of paternity even though he had reason to believe he was the father of the child and had an opportunity to establish such a relationship. The question here is did B.B. have an opportunity to establish a relationship with Baby Girl K.

In evaluating whether a substantial parental relationship exists, the legislature in §48.415(6)(a)2, Stats. authorized trial courts to consider the father's behavior during the pregnancy of the mother. Specifically, §48.415(6)(a)2, Stats. allows a court to consider whether the father "has ever expressed concern for or interest in the support, care or well-being of the child or mother during her pregnancy and whether the person has neglected or refused to provide care of support even though the person had the opportunity to do so." It is clear therefore that the legislature intended that a father's pre-delivery behavior be a consideration in determining whether the father had established a substantial parental relationship.

May a father's action prior to the birth of his child form a sufficient basis to conclude that he had an "opportunity" to establish a substantial parental relationship with the child? We hold that it may.

In §48.415(6)(b) the legislature defined "substantial parental relationship" as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." (Emphasis added). Medical authorities have long recognized that prenatal care is important

to the eventual health and well-being of an infant.[6/] Because what happens to a fetus in utero can have a significant impact upon the quality of life a child will have after birth, we conc de that a parent's action prior to a child's birth can orm a sufficient basis for determining whether that parent has established a substantial parental relationship with the child.

The parental rights of fathers of children born out of wedlock have been given constitutional protection. Stanley v. Illinois, 405 U.S. 645, 658 (1972). If the statute foreclosed the possibility of a father showing he had developed a substantial parental relationship with his child, due process would be violated. Here however, that possibility is not foreclosed. The father's parental rights must be continued absent a showing that he has failed to establish a substantial parental relationship.

The opportunity to exercise responsibility for the care and protection of a child begins before the child's birth. A statute such as this one which allows consideration of the father's conduct before the birth of the child recognizes that fact.

We conclude that the mere fact that the father of a child born out of wedlock has been incarcerated in the prison system since the fifth month of the moether's pregnancy does not preclude possible termination of his parental rights under §48.415(6)(a)2, Stats.

Concluding that §48.415(6) (a)2 allows a trial court to terminate the parental rights of a father in a situation like the one here, we now turn to the second issue before this Court on review: Was the the trial court's decision terminati: B.B.'s parental rights under the provisions of §48.415(6)(a)2, Stats. proper? We conclude it was.

The trial court determined that B.B. had "failed to assume parental responsibility for Baby Girl [K.] within the meaning of §48.415(b)." As the basis for this conclusion, the court in its findings of fact noted that: 1) B.B. had asked L.K. on two occasions to smuggle marijuana into him in prison, 2) had physically assaulted L.K. while she was pregnant, 3) B.B. had neglected to provide care or support to L.K. during the pregnancy even though he had the opportunity and ability to do so, 4) had failed to present any evidence of attempts on his part to contact the child, write to persons caring for her or to send cards or gifts, and 5) B.B. had failed to contribute toward L.K.'s medical expenses arising from the pregnancy and delivery of Baby Girl K.

A trial court's finding of fact will not be set aside unless against the great weight and clear preponderance of the evidence.[7/] A review of the record here convinces us that the findings here were correct. Each finding is supported by clear and convincing evidence in the record.

L.K. established a prima facie case for the termination of B.B.'s parental rights under the statute. Because such a case

had been established, the burden shifted and it became necessary for B.B. to present evidence that he had established a substantial parental relationship with Baby Girl K. This he completely failed to do. Although he attended the trial, he presented no testimony whatsoever on his behalf and, with the exception of his Declaration of Parental Interest, no evidence on the termination question.

Based upon his findings of fact, the trial court concluded that B.B.'s parental rights should be terminated under §48.415(6)(a) 2. He also concluded that the termination would be in the best interest of Baby Girl K.

In order for parental rights to be terminated, the petitioner must show by clear and convincing evidence that the termination is appropriate. This burden of proof is required both by §48.31, Stats. (1981-82) and by the due process clause, Santosky v. Kramer, 455 U.S. 745, 769, 102 S. Ct. 1388, 1402-1403 (1982).

We conclude that the petitioner here met this burden. The findings of fact as set out by the trial court provide clear and convincing evidence that B.B. had failed to establish a substantial parental relationship with Baby Girl K. and that termination of B.B.'s parental rights was in the child's best interest.

B.B. showed a blatant disregard for both mother and child when he asked L.K. to smuggle marijuana into prison for his use.

If L.K. had acquiesed to his request and been apprehended, she would have faced the possibility of a prison term.[8/] Further, B.B.'s physical assault of L.K. certainly shows no concern for the care or well-being of either mother or child. I. addition, the testimony of the guardian ad litem supported termination.

The law is made to try and cope with the ever increasing number of illegitimate births and to alleviate the increasing burden to society that such households often present; ever growing relief rolls, and the bleak future the children face living at a near poverty level. It is for these reasons among others that when the single mother is willing to allow her child to be adopted whatever right such a child's father may have must be resolved in a manner that looks out for the child's best interest and at the same time protects the rights of the father. It is for this reason that examining his attitude and relationship to the unborn child and its mother makes common sense. Short of abortion, the pregnant mother can't escape responsibility. But the putative father's relationship is voluntary.

After the child is born his relationship to the child is also indicative of whether a substantial relationship has been established with the child. A court cannot ignore the circumstances of why this father was not physically available from the fifth month of pregnancy. He was convicted and sentenced for burglary. This was not a case of being absent because of illness, military service or the demands of a job.

His absence was due to incarceration from the wilful act of burglary. It was his second incarceration for that crime.

B.B.'s parental rights were properly terminated under the provisions of §48.415(6) (a)2, Stats.

The third issue on review is: Must a specific finding of parental unfitness be made in order to involuntarily terminate parental rights under §48.415(6)(a) 2, Stats?

Even though sufficient findings have been made so that B.B.'s parental rights may be terminated under the statute, a question remains as to whether such a termination may be accomplished without a finding of unfitness.

In Stanley, the United States Supreme Court held that before the parental rights of an unwed father could be terminated that person was constitutionally entitled to a hearing on his fitness as a parent. 405 U.S. at 658. In Santosky, the Supreme Court noted that, "the fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents," 455 U.S. at 753, and because of this interest held that termination could only take place where there was clear and convincing evidence it was appropriate. Id. at 769.

This Court, in In the Interest of J.L.W., 102 Wis. 2d 118, 306 N.W. 2d 46 (1981), held that "the due process protections of both the State and Federal Constitutions prohibit the termination of natural parent's rights, unless the parent is unfit." In

J.L.W., because no finding was made that the natural mother was an unfit parent and because such a finding could not be sustained by the record, this Court reversed the order and judgment of the trial court terminating the natural mother's rights and eturned the child to the mother.

Both Stanley and J.L.W. involved natural parents who had at some point in their childrens' lives participated in raising them. However commentators have suggested that the failure of a parent to participate at all in raising of the child may eliminate the constitutional requirements for a finding of unfitness.[9/] We agree.

The recent United States Supreme Court case of Lehr v. Robertson, ___U.S. ___ (Case No. 81-1756, decided June 27, 1983) supports this position.[10/] In Lehr, the Court determined that the rights enjoyed by the natural fathers of children born out of wedlock did not acquire constitutional protection under the due process clause until "the unwed father demonstrates a full committment to the responsibilities of parenthood by 'coming forward to participate in the rearing of his child.'" Slip op., p. 12, quoting Caban v. Mohammed, 441 U.S. 380, 392 (1979). The Court went on to add that "the mere existence of a biological link does not merit equivalent constitutional protection." Slip op., p. 12.

In Lehr, the United States Supreme Court determined that the father of a child born out of wedlock who had lived with the

mother of the child up to the time of the child's birth and who had seen the child occasionally after the birth,[11/] had no due process right to be notified of the impending adoption of the child. Essential to this holding was a determination that the father, lacking a substantial parental relationship with the child, had no constitutionally protected interest in his relationship with the child which would be offended by his failure to be notified of the adoption proceedings.

The Unites States Supreme Court in Lehr, noting that there is a "clear distinction between a mere biological relationship and an actual relationship of parental responsibility," quoted with approval a statement by Justice Stewart in Caban:

> "Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, cf. Smith v. Organization of Foster Families, 431 U.S. 816, 862-863 (opinion concurring in judgment), it by no means follows that each unwed parent has any such right. Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." 441 U.S., at 397 (Emphasis in original) (Slip op., pp. 10-11).

The United States Supreme Court then further said in the footnote following:

> "In the balance of that paragraph Justice Stewart noted that the relationship between a father and his natural child may acquire constitutional protection if the father enters into a traditional marriage with the mother or if 'the actual relationship between father and child' is sufficient.
>
> "'The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been

> the legitimate familial relationship he creates with the child by marriage with the mother. By definition, the question before us can arise only when no such marriage has taken place. In some circumstances the actual relationship betwe father and child may suffice to create in th unwed father parental interests comparable to those of the married father. Cf. Stanley v. Illinois, supra. But here we are concerned with the rights the unwed father may have when his wishes and those of the mother are in conflict, and the child's best interests are served by a resolution in favor of the mother. It seems to me that the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children.'" Lehr fn. 16, Slip op., p. 11-12, quoting Caban, 441 U.S. at 397, (Stewart, J. dissenting). (Emphasis added).

Although in J.L.W., this Court suggested that due process might require a finding of unfitness before any natural parent's parental rights are terminated, the specific holding related only to a parent who had physical custody of the child for the first four months of the child's life and whose every action "from the time she learned of her pregnancy showed a concern for the child she was to bear." J.L.W., 102 Wis. 2d at 137. Unlike Lehr, J.L.W. was a case where the parent had already "demonstrated a full commitment to the responsibilities of parenthood." Lehr, slip op., p. 12. Thus, this Court's holding in J.L.W. does not require that a finding of parental unfitness be made where the father has failed to establish a parental relationship with the child.

In this case, the trial court found by clear and convincing evidence that B.B.'s parental rights should be terminated because

he had the opportunity but failed to establish a substantial parental relationship with Baby Girl K. We agreed with this determination. B.B.'s failure to establish a substantial parental relationship under the statute is the equivalent of a failure to "demonstrate a full commitment to the responsibilities of parenthood by 'coming forward to participate in the rearing of the child.'" Lehr, slip op., p. 12.

A natural father's interest in personal contact with his child is protected under the due process clause because of this society's belief in the protection of the familial relationship. Lehr, slip op., p. 12. The significance of this relationship "'to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children as well as from the fact of blood relationship.'" Id, quoting Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977) (quoting Wisconsin v. Yoder, 406 U.S. 205, 231-233 (1972)) (emphasis added).

Here, although in prison, B.B. had the opportunity to establish a substantial parental relationship with Baby Girl K. Instead of offering care and support to the mother and child, he did the opposite and proceeded along a path which jeopardized not only his own future but that of the mother and child. Although B.B. did not have an opportunity for "daily association" with his

child, that opportunity was lost because of his own doing. We cannot ignore this fact nor the fact that B.B. on at least one occasion attempted to strangle the mother of his child.

Where a father shows so little care, support or concern for the well-being of his child that his parental rights may be terminated under §48.415(6)(a)2, that failure to establish a substantial parental relationship with the child means that the father's interest in contact with his child does not warrant protection under the due process clause of the constitution. Due process does not require a finding of parental unfitness before a father's parental rights may be terminated under §48.415(6)(a)2.

The final issue on review is: Does §48.415(6)(a) 2, Stats. violate the equal protection clause?

This issue was raised for the first time on appeal. The Court of Appeals considered this question and concluded that this statute did not deny B.B. the equal protection of the law.

Consideration of a constitutional issue raised for the first time on appeal is discretionary with this Court and will be done if "it is in the best interests of justice to do so, if both parties have had the opportunity to brief the issue and if there are no factual issues that need resolution." Laufenberg v. Cosmetology Examining Bd., 87 Wis. 2d 175, 187, 274 N.W. 2d 618 (1979); State v. Yellow Freight System, Inc., 101 Wis. 2d 142, 158, 303 N.W. 2d 834 (1981). In this case, these requirements are met. Further, the Court of Appeals had the opportunity to

examine this issue and render an opinion on the question. We therefore will exercise our discretion to consider the issue.

Where a statute discriminates on i face between males and females, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Mississippi University for Women v. Hogan, ____U.S. ____, Slip op., p. 5 (July 1, 1982). For a statute which discriminates on the basis of gender to be upheld, there must be a showing that it "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" Hogan, slip op., pp. 5-6 quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980). This test must be applied "free of fixed notions concerning the roles and abilities of males and females." Hogan, slip op., p. 6. However, where a statute draws a distinction between classes where all the members of one class possess a characteristic not possessed by all the members of the other class, the fact that the distinction is "gender-based" should not give rise to a presumption that the Equal Protection Clause has been violated. Caban v. Mohammed, 441 U.S. 380, 409-410 (1979) (Stevens, J., dissenting).

The majority in Caban held that a New York statute which gave the mother of children born out of wedlock, but not the father of such children, veto power over the adoption of the children violated the Equal Protection Clause of the Fourteenth

Amendment. In Caban, the children involved were four and six years old at the time of the adoption proceeding. The father had lived with the mother and children as "natural family" for several years prior to the proceeding. 441 U.S. at 389. Although rejecting the contention that unwed fathers necessarily have less of a relationship with their children then do unwed mothers, the Court noted that where newborn infants were concerned, the differences between unwed mothers as a class and unwed fathers might form a basis for a valid gender-based distinction regarding adoption proceedings. 441 U.S. at 389.

In his dissent in Caban, Justice Stevens recognized this exception. He noted that from conception, "on through pregnancy and infancy, the differences between the male and female have an important impact on the child's destiny." 441 U.S. at 404. We agree. During pregnancy, the biological make-up of the mother insures that she will provide care and support for the child forming within her. She cannot help but accept and exercise significant responsibility for the protection and care of the child because her own welfare is tied intimately to the child's.

The purpose of §48.415(6)(a)2 is to promote the best interest of a child while insuring that the rights of a father who has established a substantial parental relationship with the child will not be terminated. Both the state and the unwed mother may have substantial interests in terminating the parental

rights of a father who had no substantial relationship with the child. The statute gives fathers incentive to provide care and support for the mother and child during pregnancy and infancy. Further, it allows for a prompt determination of the status of the child so that, if desired, the child might be adopted into a family that wants a child.

The statute as applied in this case is not based upon fixed notions of what the "proper" roles of males and females should be. The United States Supreme Court in Lehr recognized that "the existence or non-existence of a substantial relationship is a relevant criterion in evaluating both the rights of the parents and the best interests of the child." Slip op., p. 18. The statute here is based upon a recognition that for women biology dictates that they provide care and support for a child during pregnancy. For men however, that care and support must be voluntarily given. Men may or may not accept and exercise significant responsibility for the care and protection of the child during pregnancy; women have it thrust upon them. For men, failure to establish a substantial parental relationship after a child is born is the equivalent of a married father abandoning or neglecting his child which can be the basis for a finding of unfitness. And, as the United States Supreme Court in Lehr noted, "if the father had not 'come forward to participate in the rearing of his child, nothing in the Equal Protection Clause [would] preclude[] the State from withholding from him the

privilege of vetoing the adoption of that child.'" Slip op., p. 19. Here, while termination of parental rights rather than the availability of a veto over the child's adoption is at issue, the equal protection questio. is substantially the same.

The statute as applied here does not violate the Equal Protection Clause of the Fourteenth Amendment.

We agree with the trial court and the Court of Appeals that the record here amply supports termination of B.B.'s parental rights.[12/]

BY THE COURT: Decision of the Court of Appeals is affirmed.

No. 82-087 (IN THE INTEREST OF BABY GIRL K.) FOOTNOTES:

1/ Section 48.415(6)(a)2 and 6(b), Stats. (1981-82) reads:

> "Grounds for involuntary termination of parental rights. At the fact-finding hearing the court may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following: . . .
>
> "(6) FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility may be established by a showing that a child has been born out of wedlock, not subsequently legitimated or adopted, that paternity was not adjudicated prior to the filing of the petition for termination of parental rights and: . . .
>
> "2. That although paternity to the child has been adjudicated under s. 48.423, the father did not establish a substantial parental relationship with the child prior to the adjudication of paternity although the father had reason to believe that he was the father of the child and had an opportunity to establish a substantial parental relationship with the child.
>
> "(b) In this subsection, 'substantial parental relationship' means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child or the mother during her pregnancy and whether the person has neglected or refused to provide care or support even though the person had the opportunity and ability to do so."

2/ L.K.'s testimony as to these acts was admitted at trial not to prove the commission of the acts but for the purpose of showing that B.B. had funds to support L.K. during this period.

3/ L.K. testified on cross-examination that she asked B.B. prior to his incarceration for help in paying her expenses and in fact had her first doctor bill sent to his house. After the bill went unpaid, it was redirected to L.K.'s parents' house for payment.

No. 82-087 (IN THE INTEREST OF BABY GIRL K.) FOOTNOTES:

4/ B.B.'s January 26, 1981 letter to L.K. (Exhibit 1 in the record) shows this concern: "I feel that if you do give our baby away that you'll be out fucking guys and you'll forget about me. . .I worry alot about guys going after your ass. . . ."

5/ The report of the social worker from the Marathon County Department of Social Services dated November 19, 1981 and filed with the Court November 24, 1981 shows that B.B. was born June 14, 1958. He was one of three children born to his mother in her first marriage. His parents were divorced in January of 1961. The mother married J.H. later that year and two children were born to them. The social worker's report shows that the department provided social services periodically from the time of the breakup of the first marriage. In 1975 B.B. was placed "in substitute care" because of B.B.'s "disruptive behavior." When B.B. became eighteen the case was closed. A daughter from the second marriage was placed in "substitute care" in 1976. That case was apparently closed when the girl became eighteen in 1980.

6/ 4B G. Gray, Attorneys' Textbook of Medicine, §§305.10, 305.11 (3 ed. 1963); 5B Lawyers' Medical Cyclopedia, §37.5a (C. Frankel ed. 1972).

7/ Onalaska Electrical Heating, Inc. v. Schaller, 94 Wis. 2d 493, 501, 288 N.W. 2d 829 (1980); Cogswell v. Robertshaw Controls Co., 87 Wis. 2d 243, 250, 274 N.W. 2d 647 (1979); Bank of Sun Prairie v. Opstein, 86 Wis. 2d 669, 676, 273 N.W. 2d 279 (1979); Gehr v. Sheboygan, 81 Wis. 2d 117, 122, 260 N.W. 2d 30 (1977); Gerner v. Vasby, 75 Wis. 2d 660, 662-664, 250 N.W. 2d 319 (1977).

8/ Section 161.465(1), Stats. (1981-82).

9/ S. Hayes and M. Morse, Adoption and Termination Proceedings in Wisconsin: Straining the Wisdom of Solomon, 66 Mq. L. Rev. 439, 452, 475 (1983); See Lehr v. Robertson, ___U.S.___, (Case No. 81-1756, decided June 27, 1983), Slip op. p.13, footnote 17.

No. 82-087 (IN THE INTEREST OF BABY GIRL K.) FOOTNOTES:

10/ Justice Stevens stated that the questions the United States Supreme Cour had jurisdiction to consider on review were "whether the New York Statutes are unconstitutional because they inadequately protect the natural relationship between parent and child or because they draw an impermissible distinction between the rights of the mother and the rights of the father." Lehr, Slip op., p. 7, fn. 10.

On the latter issue, the father contended "that the gender-based classification in the statute, which denied him the right to consent to [his daughter's] adoption and accorded him fewer procedural rights than her mother, violated the Equal Protection Clause." Id.

11/ According to Justice White in his dissent in Lehr, the fact that the father only occasionally saw the child after her birth was the direct result of the mother's attempts to conceal her whereabouts from the father. As Justice White states the facts:

"According to Lehr, [the father], he and Jessica's mother met in 1971 and began living together in 1974. The couple cohabited for approximately 2 years, until Jessica's birth in 1976. Throughout the pregnancy and after the birth, Lorraine [the mother] acknowledged to friends and relatives that Lehr was Jessica's father; Lorraine told Lehr that she had reported to the New York State Department of Social Services that he was the father. (footnote omitted). Lehr visited Lorraine and Jessica in the hospital every day during Lorraine's confinement. According to Lehr, from the time Lorraine was discharged from the hospital until August, 1978, she concealed her whereabouts from him. During this time Lehr never ceased his efforts to locate Lorraine and Jessica and achieved sporadic success until August, 1977, after which time he was unable to locate them at all. On those occasions when he did determine Lorraine's location, he visited with her and her children to the extent she was willing to permit it. When Lehr, with the aid of a detective agency, located Lorraine and Jessica in August, 1978, Lorraine was already married to Mr. Robertson. Lehr asserts that at this time he offered to provide financial assistance and to set up a trust fund for Jessica, but that Lorraine refused. Lorraine threatened Lehr with arrest

FOOTNOTE 11/ CONTINUED ON PAGE 4.

No. 82-087 (IN THE INTEREST OF BABY GIRL K.) FOOTNOTES:

FOOTNOTE 11/ CONTINUED:

unless he stayed away and refused to permit him to see Jessica. Thereafter Lehr retained counsel who wrote to Lorraine in early December, 1978, requesting that she permit Lehr to visit Jessica and threatening legal action on Lehr's behalf. On December 21, 1978, perhaps as a response to Lehr's threatened legal action, appellees commenced the adoption action at issue here." Lehr, (White, J., dissenting) slip op., p. 2-3.

12/ The statement by Justice Abrahamson in footnote 1 of her dissent alleging that "the majority treats termination of parental rights like a punishment for a crime, thus increasing the legislatively prescribed penalties for commission of a crime by adding a new penalty, loss of a child" is an unwarranted conclusion and is simply incorrect.

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gifts." The entire record before this court simply does not support this finding. The majority perpetuates the trial court's error by also ignoring this very relevant and important evidence.

On the basis of the entire record before this court and the trial court, I believe that the trial court's finding that the statutory grounds for involuntary termination were met to be unsupported by the record. However, because of the nature of the evidence in the record, I would remand the action for a new hearing on this issue rather than simply finding that the statutory grounds were not met. Some of the evidence of B.B.'s attempts to contact the child consists of references to letters which are not in the record and their actual content is unknown. Further, some of the evidence that is actually contained in the record may not have been properly before the trial court. Finally, I believe that the trial court is in a better position to assess the credibility of such evidence and witnesses. This is especially important in this case because L.K. and the guardian ad litem state that B.B.'s concern for the child is motivated solely by his desire to effect a reconciliation with the mother. B.B. denies any such motivation and there is some evidence in the record showing that his interest is genuine, see n. 2, supra. This court is simply not in a position to make an informed decision on this issue which involves a credibility determination. For these reasons I believe this issue should be retried under authority granted to this court by sec. 751.06, Stats.

The majority also holds that due process does not require a finding that B.B. is an unfit parent before his parental rights can be terminated. I disagree. The majority relies on the recent United States Supreme Court decision in Lehr v. Robertson, _____U.S.____ (June 27, 1983), to support this position. I believe their reliance on the Lehr decision is misplaced.

First, the court in Lehr was addressing the limited issue of whether the New York statutory scheme adequately protected

the putative father's opportunity to form a parental relationship with his child, such that he would then be entitled to notice of adoption proceedings. Lehr, _____U.S._____, Slip. op., p. 14. The New York statutory scheme under review in Lehr has absolutely no similarity to sec. 48.415 (6) (a) 2, Stats., and thus Lehr at best has only very limited applicability to the instant case.

Second, I read Lehr to fall into the holding of Quilloin v. Walcott, 434 U.S. 246 (1978), as interpreted by this court in In Interest of J.L.W., 102 Wis. 2d 118, 306 N.W. 2d 46 (1981). In J.L.W. the court held that "except under unusual circumstances like those presented in Quilloin, the due process protections of the State and Federal Constitutions prohibit the termination of a natural parent's rights, unless a parent is unfit." 102 Wis. 2d at 136. The unusual circumstances in Quilloin which allowed the court to terminate parental rights without a finding of unfitness are as follows: an unwed father attempted to block the adoption of his son by the natural mother and her husband when the child was eleven years old and had been in the mother's custody his entire life. The father never had custody and was not seeking custody but wanted to block the adoption which would terminate his parental rights. The court rejected the father's argument that he was denied due process, stating:

> "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' Smith v. Organization of Foster Families, 431 U.S. 816, 862-863 (1977) (STEWART, J., concurring in judgment). But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.' " 434 U.S. at 255.

Similarly, in Lehr, the putative father "never had any significant custodial, personal or financial relationship (with his child), and he did not seek to establish a legal tie until after she was two years old." Lehr, _____U.S._____, Slip op., p. 14. Also, as in Quilloin, the father was attempting to block the adoption by the natural mother who had had custody since birth.

The facts in this case are clearly distinguishable from those in Quilloin and Lehr. This is not a situation as in Quilloin and Lehr where the natural parent displayed almost no interest in the child for its entire life although well aware of the fact of parenthood and able to provide and care for the child. Here B.B. has indicated interest and concern for the child since he learned of her conception and has since shortly after birth requested custody. Further, B.B. is not attempting to block the adoption of Baby Girl K by the natural mother or into an established family unit as in Quilloin and Lehr. In this case the natural mother, three days after the birth, released custody of Baby Girl K to the Marathon County Department of Social Services. Here there are no adoptive parents nor adoption proceedings pending. Nor could there be until B.B.'s parental rights are terminated. Thus we find that the narrow "unusual circumstances" exception recognized in J.L.W. does not apply and due process requires that B.B. be found unfit before his rights can be terminated. As discussed above, the record simply does not support the finding of the majority that B.B. failed to establish a substantial parental relationship. He is therefore entitled to a finding of unfitness before his parental rights can be terminated. Stanley v. Illinois, 405 U.S. 645 (1972).

Further , contrary to the holding of the court of appeals, this court can not find that B.B. is an unfit parent as a matter of law based on the record before this court. Initially, there is an insurmountable constitutional obstacle to the court making such a finding based on this record -- the Due Process Clauses of the State and Federal Constitutions. It is beyond dispute that due process demands adequate notice and an opportunity to be heard when

a person is threatened with termination of a fundamental liberty interest. B.B. was never accorded this constitutionally mandated hearing and thus his parental rights can not be terminated by this court. The record clearly demonstrates that B.B. was never notified that the petitioner was attempting to prove he was an unfit parent. Further, the record shows that the issue was never litigated in the termination hearing, nor even considered by either the trial court or the petitioner. The issue before the trial court at this hearing, and all the evidence presented, was directed solely to the question of whether the statutory grounds for involuntary termination were met. Thus, on this basis alone, the majority's termination of B.B.'s parental rights unquestionably violates due process and should not be sustained.

Further, even without this constitutional impediment, the record is insufficient to support the court of appeals holding that as a matter of law B.B. is an unfit parent. The evidence required to support a finding of parental unfitness must be very substantial:

> "The standards for a finding of unfitness in Wisconsin have long deferred, as much as possible, to parental rights. When unfitness is found, however, it must be based upon most substantial grounds. The standards for unfitness have long been stringent. To support a finding of unfitness,
>
> " 'it must appear that the [parent] has "so conducted himself, or shown himself to be a person of such description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended,—should be superseded or interfered with." [Emphasis added.]'
>
> Lemmin v. Lorfield, 107 Wis. 264, 266, 83 N.W.359, 360 (1900). It is evident, then, that a finding of unfitness is a determination that further contact between parent and child will be seriously detrimental to the child." Termination of Parental Right to A.M.K., 105 Wis. 2d 91, 102, 312 N.W. 2d 840 (Ct. App. 1981).

The record simply does not support a finding that as a matter of law it is essential for Baby Girl K's safety or welfare that B.B.'s parental rights be terminated.

The court of appeals, in holding that a finding of unfitness was "clearly sustained by the record," stated:

> "The trial court found that prior to his incarceration, B.B. had funds available to provide care and support for L.K. but failed to do so. The court also considered the incident of physical violence by B.B. toward the mother during her pregnancy and the fact that he requested that she smuggle marijuana into the prison for him twice during her pregnancy. At the very least, B.B.'s conduct demonstrates a complete indifference to the welfare of the child. The court also found that although B.B. was interested in the child, he failed to carry through with actions that would establish a substantial parental relationship."

The court of appeal's reference to the failure of B.B. to support L.K. and establish a substantial parental relationship can not be considered by this court in determining unfitness because the trial court's finding that the statutory grounds were met was not supported by the record. Further, I conclude that evidence of one isolated physical assault on the mother and two requests for marijuana while in prison do not as a matter of law make B.B. an unfit parent by clear and convincing evidence.

The only other evidence in the record that goes to unfitness is the fact that B.B. is now incarcerated for a burglary conviction, has a criminal record, and according to L.K.'s testimony, B.B. "dealt in drugs" and "robbed places." While all this evidence clearly is relevant to the issue of fitness, there are no facts in the record detailing any of this evidence. All the record contains is the bare facts stated above. Without an examination into the details of B.B.'s actions, a finding of unfitness is not supportable.

This court can not, based on this inadequate record, make the far-reaching finding of unfitness which leads to the irrevocable termination of parental rights As stated by this court in Termination of Parental Rights to T.R.M., 100 Wis. 2d at 689: "An examination of a record seldom is adequate to make the necessary factual determinations that are a part of this type of controversy." I would also remand the action to the trial

court to conduct a hearing on B.B.'s fitness as a parent.

I therefore dissent.

I am authorized to state that Justices Heffernan and Abrahamson join in this dissent.

No. 82-087

STATE OF WISCONSIN : IN SUPREME COURT

IN THE INTEREST OF BABY GIRL K,
a person under the age of 18:

L.K.,

Petitioner-Respondent-Petitioner,

v.

B.B.,

Respondent-Appellant.

FILED

JUL 1 1983

MARILYN L. GRAVES
CLERK OF SUPREME COURT
MADISON, WISCONSIN

SHIRLEY S. ABRAHAMSON, J. (dissenting). I join Chief Justice Beilfuss's dissenting opinion.[1] I write separately to add that I disagree with the majority's conclusion that sec. 48.415(6)(a)2, Stats. 1981-82, does not violate the equal protection clauses of the Wisconsin and the United States constitutions.

Everyone agrees that sec. 48.415(6)(a)2 treats unmarried parents differently according to their gender. Sec. 48.416(6)(a)2 establishes grounds for terminating the unwed father's parental rights, not the mother's. I conclude that the statute on its face and as applied to the facts in this case unconstitutionally discriminates against men based on their gender.[2]

Both this court and the United States Supreme Court are struggling with the difficult issue of defining the constitutional rights of parents and children. Judges and lawyers, like the general public, are parents and are not insulated from the highly personal and sometimes emotionally charged nature of the issues presented in these cases.[3] In this case we are specifically concerned about the due process and equal protection rights of unwed parents. The Supreme Court first indicated its recognition that unwed fathers have constitutional rights just eleven years ago in Stanley v.

Illinois, 405 U.S. 645 (1972). Stanley raised more questions than it answered, leaving at least four major legal issues unresolved: whether the constitutional rights of unwed fathers are based on concepts of procedural or substantive due process or both; whether all unwed fathers have constitutional rights or whether only unwed fathers who have expressed an undefined amount of interest in the child are to be accorded constitutional protection; whether the constitutional rights of unwed fathers are different depending on the type of proceedings, for example, adoption and termination of parental rights as opposed to custody; and whether equal protection concerns are addressed to distinctions between married and unmarried parents or between male and female parents.

Since Stanley, the Supreme Court has had few occasions to examine the extent to which a natural father's biological relationship with his illegitimate child is accorded constitutional protection. See Quilloin v. Walcott, 434 U.S. 246 (1978), Caban v. Mohammed, 441 U.S. 380 (1979), and, decided just four days ago, Lehr v. Robertson, ___ U.S. ___ (June 27, 1983).[4] Both Quilloin and Lehr appear to address the due-process issue as applied to a particular case; Caban addressed the gender discrimination issue.

State legislatures, too, have wrestled with the problem of striking a balance between according rights to parents and ensuring that terminations are handled quickly and efficiently so that adoptions can proceed. See secs. 48.40 et seq., Stats. 1981-82. Recognizing these areas of law as troublesome and ill-defined, I turn to a consideration of one aspect of the statute's constitutionality.

Sec. 48.415(6)(a)2 provides that one of the grounds for termination of a father's parental rights shall be the father's failure to assume parental responsibility. According to the

statute, failure to assume parental responsibility may be established by showing the following:

(1) the child was born out of wedlock and is not legitimated or adopted (48.415(6)(a));

(2) paternity was not adjudicated prior to the petition for termination of parental rights (48.415(6)(a));

(3) the father did not establish a substantial parental relationship with the child prior to the adjudication of paternity although the father had reason to believe that he was the father of the child and had an opportunity to establish a substantial parental relationship with the child (48.415(6)(a)2).

Sec. 48.415(6)(b) defines the phrase "substantial parental relationship" as meaning the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the child. It sets forth the following factors which the court may consider in evaluating whether a substantial parental relationship is established: "whether the person has ever expressed concern for or interest in the support, care or well-being of the child or the mother during her pregnancy and whether the person has neglected or refused to provide care or support even though the person had the opportunity and ability to do so."

The issue is whether this gender-based distinction, allowing the termination of a father's, but not a mother's, parental rights based on failure to assume parental responsibility violates the equal protection guarantees of the federal or state constitution.

A gender-based distinction can satisfy the equal protection guarantees of the United States Constitution if the statute "at least . . . serves 'important governmental objectives and [is] . . . substantially related to achievement of those objectives.'"[5] The party seeking to uphold the statute carries "the burden of showing an 'exceedingly persuasive justification'

for the classification."[6] The constitutionality of any gender-based distinction must be examined "free of fixed notions concerning the roles and abilities of males and females," and free of "archaic and stereotypic notions" about the roles of men and women. Mississippi University for Women v. Hogan, ___ U.S. ___, 50 L.W. 5068, 5070 (1982).

This test for determining whether a gender-based distinction is constitutional has been termed the "intermediate level" scrutiny test. I, of course, accept this test for federal constitutional purposes, but for Wisconsin state constitutional purpcses, I continue to adhere to the view that because gender-based classifications are inherently suspect, the "strict scrutiny" test is more appropriate. Marshfield Clinic v. Discher, 105 Wis.2d 506, note 8 at 524, 314 N.W.2d 326 (1982) (Abrahamson, J., dissenting). I continue to believe that any classification based on immutable personal characteristics is "suspect" and that gender is obviously an immutable personal characteristic. Gender is a "visible characteristic determined by causes not within the control of the individual. It bears no relation to ability to contribute to or participate in society." Hewitt v. Saif, 294 Or. 33, 653 P.2d 970, 977 (1982). I do not believe it is necessary to analyze this statute according to a strict scrutiny standard, however, because this statute can not withstand the lesser intermediate level of scrutiny.

I conclude that the statute on its face and as applied is unconstitutional under the state and federal constitutions because the means used to achieve the government's objectives are not "substantially related to the achievement of those objectives." I first consider whether the statute on its face is unconstitutional.

The statute is designed to achieve the important governmental objectives of promoting the best interests of the child, protecting the rights of interested third parties, and

ensuring promptness in and finality of the termination of parental rights to facilitate the child's adoption. I agree that these objectives are legitimate and important. Lehr v. Robertson, ___ U.S. ___, slip op., p. 18 (June 27, 1983); In the Interest of DLS, 112 Wis.2d 180, 187, ___ N.W.2d ___ (1983). Like its interest in voluntary termination proceedings, the state also has an interest in involuntary termination proceedings to ensure that the termination of parental rights is just. In the Interest of DLS, 112 Wis.2d 180, 185, ___ N.W.2d ___ (1983).

The statute can only be upheld, though, if the gender-based distinction in sec. 48.415 (a)(6)2 "is structured reasonably to further these ends," Caban v. Mohammed, 441 U.S. 380, 391 (1979).

While I agree with the majority that the failure of a parent to develop a substantial parental relationship with the child is a proper ground for the involuntary termination of parental rights, see Lehr v. Robertson, ___ U.S. ___, slip op., p. 12, that truth is not sufficient to enable the statute to withstand constitutional attack. The state must still answer the question of why the statutory criterion applies to male parents but not to female parents.

There appear to be three justifications for this gender-based distinction. First, it may be argued that the distinction is justified because one automatically knows the identity of the mother, but the father is neither known nor accessible. In this case, and in all cases in which sec. 48.415(6)(a)2 applies, that basis for distinguishing between an unwed mother and an unwed father is irrelevant because the substantial parental relationship criterion is applicable only after the putative father has been notified of the termination proceedings, has appeared, and his paternity has been adjudicated. The legislature has already provided a means to

terminate the parental rights of a father who cannot be identified or found. Sec. 48.415(a)(6)1.

The second possible justification for the gender-based distinction concerns the differences between the parents during the child's gestation period. The majority justifies the gender-based statute on the basis of the biological distinction between men and women concerning a child's gestation, just as it relies primarily on the father's actions during pregnancy to affirm the trial court's findings that the evidence fulfilled the statutory termination grounds (see Beilfuss, C.J., dissenting, slip op., p. 3). Because women can become pregnant and physically can carry children within their bodies, but men cannot, reasons the majority, the gender-based distinction is justified.

I do not dispute the fact that there are biological differences between men and women. But I do not agree that these biological differences are sufficient justifications for this gender-based statute. The United States Supreme Court has recently strenuously emphasized that a parent's "mere biological relationship" with a child is not accorded constitutional protection. Lehr v. Robertson, ___ U.S. ___, slip op., pp. 11-12 (June 27, 1983). "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." Id., at ___, slip op., p. 11, quoting with approval from Caban v. Mohammed, supra, 441 U.S. at 397 (Stewart, J., dissenting), quoted with approval in the majority opinion, slip op., pp. 16-17. In Lehr, the Court distinguished between "a mere biological relationship and an actual relationship of parental responsibility" created by the parent's role in the child's life. Lehr at ___, slip op., p. 12, and p. 13, n.17. The Court in Lehr considered only the role of a biological father, because only that issue was before it, but the same reasoning applies to a biological mother. This reasoning

undermines the very premise of the majority's holding that the mere biological differences between the father and mother, that is, insemination versus pregnancy, justify a gender-based distinction as to grounds for termination of parental rights.

Even if the biological difference between man and woman can be considered as the basis for establishing different grounds for termination of the father's and mother's parental rights, the reasons based on biological differences pointed out by the majority as support for the gender-based distinction do not withstand scrutiny. According to the majority, a man, unlike a woman, has the choice whether to care for the unborn child by caring for the pregnant woman and should forfeit parental rights to the child if he does not fulfill his parental responsibility to the unborn child by taking care of the mother. The majority asserts that, as a matter of nature, "biology dictates that [the mother] provide care and support for a child during pregnancy [by taking care of herself]." Slip op., p. 22. The mother, as the carrier of the child, cannot, says the majority, choose not to accept and exercise significant responsibility for the care and protection of the child during pregnancy. The majority asserts that the woman's only option other than to exercise responsibility is to abort the pregnancy. Slip op., p. 13. The majority is, I suggest, mistaken about a woman's role during pregnancy.

Biology dictates only that a woman carry a child. It does not dictate that she show responsibility by providing proper care for herself (and thus the unborn child) or even that she love the child. The mother has control over prenatal care which, as the majority recognizes, is "important to the eventual health and well-being of an infant." Slip op., p. 10 and n.6. A woman can disregard the care and protection of the child during pregnancy by ignoring the importance of proper nutrition, medical care, and exercise, by smoking or ingesting dangerous drugs, by

overuse of caffeine and alcohol, by gaining too much or too little weight, by exposing herself to hazardous environmental elements, or by subjecting herself to stress. A woman's support and care of an unborn child are voluntary and important.[7]

The mother, by failing to take care of herself, as well as the father, by failing to take care of the pregnant woman, may fail to fulfill parental responsibilities to the unborn child. If such failure is a ground for terminating the father's rights, the majority gives no reason why it should not be a ground for terminating the mother's rights. Since the mother's role during pregnancy is generally more important than the father's, according to the majority's reasoning, it would appear that there is even more justification to terminate the mother's parental rights for failing to assume responsibility to the unborn child than the father's.

Although the statute requires the court to look at the relationship of the unwed father to the child after the child's birth, the majority confines its reasoning justifying the gender-based distinction to the gestation period or at most immediately following gestation, slip op., p. 21, because even it appears to recognize that the biological differences between unwed fathers and mothers cannot justify different treatment as to their voluntary failure to assume responsibility for the child after the child's birth.

Recognizing this fact, the majority, relying on Justice Stevens's dissenting opinion in Caban v. Mohammed, 441 U.S. 380, 389 (1979), concludes that the differences between unwed mothers as a class and unwed fathers might form a basis for a valid gender-based distinction regarding adoption proceedings where newborn infants are concerned. (Slip op., p. 20.) The Caban majority did not decide this issue, and the Court specifically concluded that even assuming a difference between the closeness of unwed mothers and unwed fathers to the child based on their

relationship to the child during pregnancy and immediately afterward, this generalized difference would not constitutionally support a gender-based distinction for purposes of adoption, and it "would become less acceptable as a basis for legislative distinctions as the age of the child increased." Caban v. Mohammed, supra, 441 U.S. at 388-89. Caban's analysis of equal protection and gender-based adoption laws was not overruled in or modified by Lehr.

Because none of the proposed justifications for the statute can withstand analysis, I conclude that the statute's gender-based distinctions are not substantially related to the governmental objectives and that the statute is unconstitutional on its face.

Even if this statute were held constitutional on its face, it is clearly unconstitutional as applied in this case. As Justice Stevens explained in Lehr v. Robertson, ___ U.S. ___, slip op., at p. 19 (June 27, 1983), a statute granting different rights to a mother and father regarding termination of their parental rights may not constitutionally be applied in those cases where the mother and father are in fact similarly situated with regard to their relationship with the child. The majority has generalized that the mother is naturally closer to her child and has the natural obligation to raise the child. In this case, though, the mother's relation to the child during pregnancy was not explored, but we do know that the mother voluntarily decided not to raise the child, placing the child outside her home within three days after its birth, for reasons that may very well stem from her love for the child and her desire to allow it to be adopted. The trial court found as a fact that the "child had no relationship with either parent. . . . " (emphasis added; slip op., p. 7). Accepting this finding of the circuit court, I must conclude that the mother and father in this case are similarly situated as to the child. Nonetheless, the statute treats the

two parents differently, for no apparent reason. If this mother refused to terminate her parental rights voluntarily, involuntary termination proceedings could not be instituted against her on the ground that she failed to establish a substantial parental relationship with the child because the statute does not apply to the unwed mother. When one takes into consideration the father's actual efforts to establish a relationship with the child by initiating paternity proceedings one month after the child's birth and expressing constant interest in the child, it is ironic that he, but not the mother, can have his parental rights involuntarily terminated on this ground and without a finding of unfitness. According to Lehr, this statute is unconstitutional as applied in this case.

I conclude that the statute systematically harms men by assuming that even those unwed fathers who come forth after a child's birth, assert and adjudicate their paternity, and make reasonable efforts under the circumstances of the case to maintain parental ties with their children are to be treated differently from the biological mother regardless of her parental relationship with this child. This type of systematic harm to men can only "be explained . . . as the product of habit, rather than analysis or reflection," and cannot withstand constitutional scrutiny. Lehr v. Robertson, ___ U.S. ___ (slip op., p. 17, n.24, June 27, 1983). Sec. 48.415(6)(a)2 subjects men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose. Lehr v. Robertson, ___ U.S. ___ (slip op., pp. 17-18, June 27, 1983). Accordingly, I would hold that this statute violates the equal protection clauses of the United States and the Wisconsin constitutions. I dissent.

I am authorized to state that Justice Nathan S. Heffernan joins in this dissent.

[1] I only add that the majority treats termination of parental rights like a punishment for a crime, thus increasing the legislatively prescribed penalties for commission of a crime by adding a new penalty, loss of a child. Slip op., pp. 13, 19. The purpose of termination should be to permanently place children in accordance with their best interests, not to punish a parent. I would hold that the penalty of termination of parental rights for the commission of a crime is per se cruel and unusual punishment in violation of the United States Constitution, amends. VIII, XIV, and the Wisconsin Constitution, art I., sec. 6.

[2] Under this reasoning it is not necessary to reach any of the other issues presented in this case. A court can terminate parental rights involuntarily if one of the grounds for termination under sec. 48.415 is proved in a fact-finding hearing. Sec. 48.42(1)(c)2, Stats. 1981-82. See also In the Interest of DLS, 112 Wis.2d 180, 186, ___ N.W.2d ___ (1983). Only after the court finds that a statutory ground for termination of parental rights exists does the court reach the question of whether the parent whose rights are to be terminated is unfit. In this case the statutory ground set forth in the petition and argued at trial was the father's failure to assume parental responsibility. Sec. 48.415(6)(a)2. If the statutory ground is void because it violates the constitutions of this state and of the United States, the trial court could not involuntarily terminate the father's parental rights in this case, regardless of whether he was unfit as a parent. See slip op., pp. 18, 19.

[3] I find some of the majority's sociological observations questionable, but because they are only tangentially relevant to the legal issues presented in this case I do not discuss them.

[4] I question the majority's haste to conclude that Lehr v. Robertson makes superfluous any due process protections accorded by this state's statutes or constitution. The Supreme Court decided Lehr v. Robertson four days ago. This court has had only parts of two days to reflect on that case and the differences between the New York statutes involved in Lehr and the Wisconsin statutes. I would have preferred to give the parties and the state an opportunity to submit briefs on the possible impact of Lehr on the issues presented in this case to enable this court to give Lehr the considered reflection it deserves. Because the majority considers Lehr, I, too, reluctantly consider it.

[5] Mississippi University for Women v. Hogan, ___ U.S. ___, 50 L.W. 5068, 5070 (1982), quoting from Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 150 (1980). See also Lehr v. Robertson, ___ U.S. ___ slip op., pp. 17-18 (June 27, 1983); Craig v. Boren, 429 U.S. 190, 197 (1976); Caban v. Mohammed, 441 U.S. 380, 388 (1979).

[6] Mississippi University for Women v. Hogan, ___ U.S. ___, 50 L.W. 5068, 5070 (1982), quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979).

7 See Castello, Getting Ready for Parenthood: A Manual for Expectant Mothers and Fathers, pp. 45-50 (1957); Hess and Hunt, Pickles and Ice Cream, The Complete Guide to Nutrition During Pregnancy (1982) passim; NIOSH, Guidelines on Pregnancy and Work (1977) passim; Russell, Eastman's Expectant Motherhood 48-87 (6th ed., 1977); Verrilli and Mueser, While Waiting: A Prenatal Guidebook, 25-46 (1982).

APPENDIX B

COURT OF APPEALS
DECISION
DATED AND RELEASED

AUG 17 1982

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62 (1).

NOTICE

This opinion is subject to further editing. If published the official version will appear in the bound volume of The Official Reports.

No. 82-087

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

In the Interest of Baby Girl K,
a person under the age of 18:

L.K.,

Petitioner-Respondent,

v.

B.B.,

Respondent-Appellant.

APPEAL from a judgment of the circuit court for Marathon county: LEO D. CROOKS, Judge. Affirmed.

FOLEY, P.J. B.B. appeals a judgment terminating his parental rights to Baby Girl K. His petition to bypass this court, sec. 808.05, Stats., and his motion for a three-judge panel, sec. 809.41, Stats., were denied. Because this court concludes that sec. 48.415(6)(a)2, Stats., does not violate B.B.'s right to equal protection and because the trial court findings supporting termination are not against the great weight

and clear preponderance of the evidence, the judgment is affirmed.

FACTS

Baby Girl K. was born out of wedlock to L.K. on March 17, 1981. B.B., the father of the child, was incarcerated in November, 1980, about five months into L.K.'s pregnancy. The child was placed in a foster home immediately after birth. B.B. filed a petition for determination of paternity, and L.K. filed a petition for the involuntary termination of B.B.'s parental rights. The court found that B.B. was the father of the child and terminated his parental rights.

At the hearing on the petition for termination, L.K. testified that the child had not been legitimated or adopted and that B.B. knew and publicly acknowledged paternity. She testified that during the period of her pregnancy between June and November, 1980, B.B. spent "every day" with her, but did not aid her in any way. She further testified that during her pregnancy, he once tried to strangle her and twice asked her to smuggle marijuana into prison for him. At the time of these incidents, L.K. was a minor.

CONSTITUTIONALITY OF STATUTE

B.B. claims that the gender-based classific ion in sec. 48.415(6)(a)2 denies him equal protection of the law and is therefore unconstitutional. Section 48.415(6)(a)2 provides that an unwed father who fails to develop a substantial relationship with his child is subject to an involuntary termination of his parental rights. There is no corresponding provision for the unwed mother of the child.

This court concludes that the application of sec. 48.415(6)(a)2 to B.B. does not unconstitutionally deny him equal protection of the law. The burden was on B.B. to prove that the sec. 48.415(6)(a)2 classification was unreasonable. See State v. Mertes, 60 Wis.2d 414, 416-17, 210 N.W.2d 741, 743 (1973). A court will uphold the classification when it is substantially related to achieving an important governmental objective. State v. Hill, 91 Wis.2d 446, 451, 283 N.W.2d 451, 453 (Ct. App. 1979).

The gender-based classification in sec. 48.415(6)(a)2 is reasonable, and the statute does achieve the important governmental objective of promoting the best interests of the child. It is reasonable to treat fathers differently from mothers because a father's relationship with a child is

necessarily different from a mother's relationship, both before and after a child's birth. A father does not get pregnant. Fatherhood must therefore be established while motherhood cannot be questioned. Until paternity is adjudicated, a father cannot be made to support his child. Conversely, a mother has no choice but to support her child, regardless of any court adjudication of her maternity. Additionally, during the pregnancy, a mother must always have a substantial relationship with her child.

The objective of sec. 48.415(6)(a)2 is to promote the best interests of the child. See sec. 48.01(2), Stats. This is an important governmental objective. Clearly, it is in a child's best interests to have a father who is concerned with and interested in the child's well-being, care, and support. By requiring a father to show this concern and interest to avoid termination of his parental rights, the statute promotes the best interests of the child.

SUFFICIENCY OF EVIDENCE

The trial court finding that termination of B.B.'s parental rights would be in the best interests of Baby Girl K is not against the great weight and clear preponderance of the evidence and therefore will not be upset on appeal. See G.G.D. v. State, 97 Wis.2d 1, 12, 292 N.W.2d 853, 858 (1980). On the

contrary, the finding is supported by the overwhelming weight of the evidence. The child had no relationships with B.B. or other family members, and termination of B.B.'s parental rights would certainly not be harmful to the child. The child has been in foster care since birth and has never known her biological parents. Additionally, if B.B.'s parental rights are terminated, the child can enter immediately into a family relationship with more stability. B.B., conversely, could not personally care for the child until his release from prison. His suggestion that the child be placed with his parents until his release was justifiably not acceptable to the court.

This court also concludes that the evidence was sufficient to support a finding that B.B. had an opportunity to develop a substantial relationship with Baby Girl K. Before termination is authorized by sec. 48.415(6)(a)2, the parent whose rights are being terminated must have had such opportunity. B.B. claims that his imprisonment denied him the opportunity to develop a substantial relationship.

Although it was more difficult for B.B. to develop a parental relationship with his child because he was in prison, it was not impossible. As noted by the court, there was no evidence of attempts to send cards or gifts to the child. B.B. also had the opportunity to exercise significant responsibility

for the child before his imprisonment. He could have assumed at least some responsibility for the support, care, and comfort of the mother. The trial court properly considered this period of time in determining whether such a relationship has been developed. Section 48.415(6)(b) specifically provides that the court may consider the period of the pregnancy, and with good reason. This is an important period for both the child and the mother. The putative father's efforts and interest during the pregnancy may also bear significantly on his sincerity in later opposing the termination of his parental rights and on his concern for his child.

NECESSITY OF FINDING OF UNFITNESS

This court concludes that a specific finding that B.B. was an unfit parent was not necessary to terminate his parental rights. When termination of parental rights is so clearly in a child's best interests, this court should attempt to uphold the termination. Nevertheless, B.B. argues that the court must make a finding that he is an unfit parent before it may terminate his parental rights. B.B. relies on Quilloin v. Walcott, 434 U.S. 246 (1978), and Interest of J.L.W., 102 Wis.2d 118, 306 N.W.2d 46 (1981).

J.L.W. does not control the disposition of this appeal. In J.L.W., the court held that a finding of unfitness had to be made before the court could terminate a mother's parental rights. This holding was carefully limited to the specific facts presented in the case. Id. at 135, 306 N.W.2d at 54. The facts in J.L.W. and in this case differ substantially. The mother in J.L.W. had legal custody of the child, and she also had physical custody of the child for the first four months of the child's life. B.B. has never had either legal or physical custody of Baby Girl K. In J.L.W., no finding of the mother's unfitness as a parent was made, nor could such a finding be sustained on the record. Although a finding that B.B. was an unfit parent was not made, such a finding is clearly sustained by the record.

The trial court found that prior to his incarceration, B.B. had funds available to provide care and support for L.K. but failed to do so. The court also considered the incident of physical violence by B.B. toward the mother during her pregnancy and the fact that he requested that she smuggle marijuana into the prison for him twice during her pregnancy. At the very least, B.B.'s conduct demonstrates a complete indifference to the welfare of the child. The court also found that although B.B. was interested in the child, he

failed to carry through with actions that would establish a substantial parental relationship.

Additionally, _..L.W._ recognized that there were circumstances such as those in Quilloin in which due process did not preclude a termination without a finding that the parent was unfit. There are similar circumstances present in this case. B.B. has never been a member of his child's family and, in fact, has never seen the child. He also has never had custody of the child. Additionally, he is presently incarcerated and he has a criminal record. Individually, these circumstances would not necessarily support a termination without a finding of unfitness. When all the circumstances are combined, however, and balanced against the persuasive evidence of the child's best interests, they are sufficient to permit the termination of B.B.'s parental rights.

By the Court.--Judgment affirmed.

Not recommended for publication in the official reports.

APPENDIX C

STATE OF WISCONSIN | CIRCUIT COURT CHILDRENS DIVISION, BR. II | MARATHON COUNTY

In the interest of:

BABY GIRL KRUEGER,
a person under the age of 18.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT - TERMINATION OF PARENTAL RIGHTS

CASE No. 81-JU-391B

FACT FINDING HEARING:

PRESIDING JUDGE: Leo D. Crooks
Place: Marathon County Circuit Court Branch III
Wausau, WI 54401

Date: December 23, 1981

Appearances: Petitioner, Lisa Marie Krueger
Petitioner's attorney, Patrick M. Brady
Respondent, Bryon Buhse
Respondent's attorney, Gerhardt F. Getzin
Guardian ad litem, Attorney James Kurth
Attorney for Marathon County Department of Social Services, Weldon Nelson

I, the Judge, before whom this matter was tried, do hereby make the findings of fact, conclusions of law and judgment:

FINDINGS OF FACT

1. The petitioner in this action is Lisa Marie Krueger, mother of Baby Girl Krueger, who resides at 705 East Lakeshore Drive, Wausau, Wisconsin 54401.

2. The respondent, Bryon Buhse, resides at Kettle Morraine Correctional Facility, P. O. Box 51, Plymouth, Wisconsin 53703.

3. The petitioner, Lisa Marie Krueger, and respondent, Bryon Buhse, are the natural parents of Baby Girl Krueger, born March 17, 1981. That said child was born out of wedlock, has not been subsequently legitimated or adopted.

4. That at the time of filing of the petition herein, paternity of Baby Girl Krueger had not been adjudicated but that the paternity of Bryon Buhse with respect to Baby Girl Krueger was adjudicated prior to the commencement of the hearing in this matter.

5. That all persons who were proper parties to this action were personally served with the summons and petition herein, received proper notice of all hearing dates and were given the opportunity to appear and testify in person.

6. That Baby Girl Krueger has resided in foster care at 306 Prospect Avenue, Wausau, Wisconsin 54401 since leaving the hospital at the time of her birth.

50

B

7. That during the period that petitioner was pregnant with Baby Girl Krueger, the respondent, Bryon Buhse, on two occasions, wrote letters to petitioner asking her to smuggle marijuana into the Kettle Morraine Correctional Facility for his personal use.

8. That on one occasion during the period that petitioner was pregnant with Baby Girl Krueger the respondent, Bryon Buhse, physically assaulted petitioner.

9. That the respondent, Bryon Buhse, neglected to provide care or support to petitioner during her pregnancy even though respondent, Bryon Buhse, had the opportunity and ability to do so.

10. That respondent, Bryon Buhse, failed to present evidence of any attempts on his part to establish a parental relationship with Baby Girl Krueger such as attempts to contact said child, write to persons caring for said child or to send the child cards or gifts.

11. That respondent, Bryon Bushe, failed to make any attempt to contribute towards the medical expenses of petitioner occasioned by her pregnancy and the subsequent delivery of Baby Girl Krueger.

12. That there is a high degree of likelihood that Baby Girl Krueger will be adopted in the event the parental rights of Bryon Buhse are terminated.

13. That Baby Girl Krueger is in good health and at the time of placement of foster care, was only three (3) days old.

14. That the child has had no relationship with either parent or other family members so that it would not be harmful to said child to sever such relationships.

15. That in the event the parental rights of Bryon Buhse are terminated, that the child will be able to enter into a more stable and permanent family relationship.

CONCLUSIONS OF LAW AND JUDGMENT

16. That respondent, Bryon Buhse, has failed to assume parental responsiblity for Baby Girl Krueger within the meaning of Sec. 48.415 (6), Wis. Stats.

17. That it is in the best interest of Baby Girl Krueger that the parental rights of her father, Bryon Buhse, be terminated.

18. The parental rights of Bryon Buhse to his minor child, Baby Girl Krueger, d/o/b March 17, 1980, are permanently terminated as of the date of this judgment pursuant to Sec. 48.427, Wis. Stats.

JUDGMENT IS HEREBY RENDERED AND THE CLERK IS ORDERED TO ENTER THIS JUDGMENT.

Dated this 30th day of December, 1981 but effective December 23,1981.

BY THE COURT:

/s/
LEO D. CROOKS, Circuit Judge

Approved, December 28th, 1981

/s/
Patrick M. Brady, Attorney for Petitioner

Approved December 29th, 1981

/s/
James Kurth, Guardian ad Litem

Patrick Brady Law Office
215 Grand Avenue
Wausau, WI 54401
Telephone: (715) 842-9822

APPENDIX D

DCS-SS-19A (11-78)

DECLARATION OF PATERNAL INTEREST*



TO: Division of Community Services
Bureau for Children, Youth and Families
1 West Wilson Street
Madison, Wisconsin 53702

I have reason to believe that I may be the father of a child born on

March 10, 1981 (Month, Year) or expected to be born on _____ (Month, Year).

Baby Girl Krueger

I am hereby declaring my interest in matters affecting this child.

Child's mother's name: Lisa Marie Krueger

Mother's approximate age: 17

Mother's last known address: 10 E. Lakeshore Dr.

Johnson, Wisc. 54101

(City, State, Zip Code)

My name is Wayne Purse
(Type or Print)

My address is Box 31

Plymouth, WI 53073
(City, State, Zip Code)

Wayne Purse
(Signature)

APR 13 1981

*Section 48.025 (Wisconsin Statutes) provides for filing a Declaration of Paternal Interest in matters affecting children.

(Forward top two copies to Division of Community Services at above address; keep third copy for your records.)

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF WISCONSIN

In the Interest of Baby Girl K.,
a person under the age of 18;

LISA KRUEGER,

Petitioner-Respondent-Respondent,

v. Case No. 82-087

BRYON BUHSE,

Respondent-Appellant-Petitioner.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Bryon Buhse, the petitioner-appellant-petitioner above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Wisconsin, entered July 1, 1983, affirming the judgment of termination of Bryon Buhse's parental rights concerning Baby Girl K., said judgment of the trial court entered on December 29, 1981.

This appeal is taken pursuant to 28 U.S.C. s. 1257(2).

Copies of this document have been served on the following attorneys representing the State of Wisconsin and all parties of record:

Bronson C. LaFollette, Attorney General, State of Wisconsin
114 East Capital, Madison, WI 53702
Thomas Finley, Assistant Corporation Counsel, Marathon County
Court House, Wausau, WI 54401
James Kurth, Guardian Ad Litem for Baby Girl K.
128 Grand Avenue, P. O. Box 1547, Wausau, WI 54401
Patrick M. Brady, Attorney for Lisa Krueger
107 Sixth Street, P. O. Box 898, Wausau, WI 54401

Dated this 29th day of July, 1983.

GETZIN & JANNETTA

BY: _____
Gerhardt F. Getzin
Attorney for Petitioner
408 Third Street, Suite 307
P. O. Box 951
Wausau, WI 54401

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SEP 30 1983
OFFICE OF THE CLERK
SUPREME COURT U.S.

83-5528

IN THE UNITED STATES SUPREME COURT

In the Matter of BABY GIRL K.,

B. B.,

Appellant,

v.

L. K.,

Appellee.

MOTION FOR LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS

Bryon Buhse, the appellant in the above matter, through his attorney, Gerhardt F. Getzin, moves the Court for allowance to proceed on this appeal in forma pauperis as follows:

1. A jurisdictional statement has been filed with this motion regarding an appeal which appellant seeks from a judgment of the Supreme Court of the State of Wisconsin.

2. Appellant is unable to prepay the fees and costs or give security therefor regarding said appeal to this Court.

3. The nature of the action is an appeal from the Supreme Court of the State of Wisconsin which has issued a judgment affirming termination of the appellant's parental rights to his child and an appeal from said court's judgment holding that a Wisconsin statute does not violate appellant's rights under the United States Constitution.

4. Appellant believes that he is entitled to redress of said court's judgment and is seeking to have this Court reverse the judgment and declare the Wisconsin statute unconstitutional since it discriminates against unwed fathers.

5. Appellant's attorney is admitted to the Bar of United States Supreme Court.

6. The state courts in the proceedings referred to in the jurisdictional statement filed with this motion granted leave to proceed in forma pauperis in the sense that appellant's attorney was appointed

Wisconsin courts since the Wisconsin State Public Defender found appellant to be indigent.

7. Attached to this motion is an affidavit in support settling forth facts showing appellant's indigency.

WHEREFORE, appellant in the above matter through his attorney moves this Court for an order granting leave to proceed in forma pauperis and for an order appointing Gerhardt F. Getzin as appellant's attorney in this Court, all pursuant to United States Supreme Court Rule 46.

Dated this 28th day of September, 1983.

CETZIN & JANNETTA

BY: 

Gerhardt F. Getzin
Attorney for Appellant
408 Third Street, Suite 307
P. O. Box 951
Wausau, WI 54401
(715)842-0823

IN THE UNITED STATES SUPREME COURT

In the Matter of BABY GIRL K.,

B. B.,

Appellant,

v.

L. K.,

Appellee.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, B. B., being first duly sworn, depose and say that I am the appellant in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security thereof; that I believe I am entitled to redress; and that issues which I desire to present on appeal appear in the jurisdictional statement filed with this motion.

I further swear that the allegations made in the motion to which this affidavit is attached are true and that the information provided below in the numbered paragraphs relating to my ability to pay the cost of prosecuting this appeal are true.

1. I am not presently employed, and the date of my last employment and the amount of the salary and wages per month were as follows:

May, 1980, $500.00 per month

2. I have not received any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources within the past twelve months.

3. I do not own any cash, checking or savings accounts.

4. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property exclusing household furnishings and clothing.

5. If my parental rights are not terminated, I may be responsible for the support of my daughter who is referred to in the jurisdictional statement.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Bryan Buhse

Subscribed and sworn to before me
this 28th day of September, 1983.

Gerhardt F. Getzin, Notary Public
Marathon County, Wisconsin
My commission is permanent.

DISTRIBUTED
JAN 20 '84

ORIGINAL

Supreme Court, U.S.
FILED
JAN 20 1984
ALEXANDER L. STEVAS
CLERK

No. 83-5528

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN THE INTEREST OF BABY GIRL K.,

A PERSON UNDER THE AGE OF 18

BRYON BUHSE, Appellant

v.

LISA KRUEGER, Appellee.

ON APPEAL FROM THE SUPREME COURT

OF THE STATE OF WISCONSIN

MOTION TO DISMISS OR AFFIRM

KORITZINSKY, NEIDER, LANGER & ROBERSON
By: Judith Sperling Newton
802 East Gorham Street
Madison, Wisconsin 53703
(608) 251-0998

FEB 17 PAGE 14

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	iii
INTRODUCTION.	1
STATEMENT OF FACTS.	2
ARGUMENT.	4
I. THE DUE PROCESS ISSUES WERE NOT PROPERLY RAISED IN ANY WISCONSIN COURT AS REQUIRED BY S.C.R. 16(1)(b)	4
A. A Challenge On Federal Grounds Must Be Explicit.	5
B. Appellant Raised No Constitutional Challenge To Wis. Stat. s. 48.415(6)(a)2 On Due Process Grounds Prior To The Present Appeal	6
II. NO WISCONSIN COURT, EXPRESSLY CONSIDERED OR ACTED UPON ANY FEDERAL DUE PROCESS CHALLENGE TO WIS. STAT. s. 48.415(6)(a)2	8
III. THE ONLY FEDERAL QUESTION PROPERLY RAISED BY APPELLANT AND EXPRESSLY CONSIDERED BY A WISCONSIN COURT SHOULD BE DISMISSED, BECAUSE IT DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION AS REQUIRED BY S.C.R. 16(1)(b)	11
IV. THE ONLY FEDERAL QUESTION PROPERLY RAISED HAS ALREADY BEEN DECIDED BY THIS COURT	13
V. WIS. STAT. s. 48.415(6)(a)2 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.	14
A. The Intermediate Standard of Review Is Appropriate For Cases Involving Gender-Based Classification.	14
B. The Gender-Based Classification Is Rational And Is Substantially Related To The Achievement Of Important Governmental Objectives. . . .	17
C. The Gender-Based Classification Is Substantially Related To The Achievement Of Important Governmental Objectives.	22

VI. THE WISCONSIN STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 24

A. The Wisconsin Supreme Court Considered The Putative Father's Conduct Both Before and After The Child's Birth 24

VII. THE STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BECAUSE NO FINDING OF PARENTAL FITNESS IS REQUIRED WHEN NO PARENT-CHILD RELATIONSHIP HAS BEEN ESTABLISHED. 26

CONCLUSION. 28

TABLE OF AUTHORITIES

Page

United States Supreme Court Cases

Barbier v. Connelly, 113 U.S. 27 (1885) 14

Beck v. Washington, 369 U.S. 541 (1962) 10

Bowe v. Scott, 233 U.S. 658 (1914). 5

Brady v. Maryland, 373 U.S. 83 (1963) 5

Bryant v. Zimmerman, 278 U.S. 63 (1928) 6

Caban v. Mohammed, 441 U.S. 380 (1979). 12,13, 17,21,22

Califano v. Boles, 443 U.S. 282 (1979). 15

Califano v. Goldfarb, 430 U.S. 199 (1977) 16

Califano v. Webster, 430 U.S. 313 (1977) 15

Califano v. Westcott, 443 U.S. 76 (1979). 16

Craig v. Boren, 429 U.S. 190 (1976) 15,16

Duren v. Missouri, 439 U.S. 357 (1979). 16

Farney v. Towle, 1 Black, 350 6

Frontiero v. Richardson, 411 U.S. 677 (1973). 16

Geduldig v. Aiello, 417 U.S. 48 (1974). 16

General Electric Co. v. Gilbert, 429 U.S. 125 (1976). 16

Guaranty Trust Company v. Blodgett, 287 U.S. 509 (1933). 11

Harding v. Illinois, 196 U.S. 78 (1904) 6

Herndon v. Georgia, 295 U.S. 441 (1935) 5,6

Kahn v. Shevin, 416 U.S. 351 (1974) 15

Kingsley Pictures Corporation v. Regents, 360 U.S. 684 (1959). 11

Lehr v. Robertson, ___ U.S. ___ (1983). 11,12, 13,14

Lewis v. Cowen, 435 U.S. 948 (1978) 15

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) 14

McDonald v. Board of Election Commissioner, 394 U.S. 802 (1968). 15

McDonald v. Oregon Navigation Company, 233 U.S. 665 (1914) 6

Minnesota v. National Tea Company, 309 U.S. 551 (1940) 10

Parham v. Hughes, 441 U.S. 347 (1979) 15

Personnel Administrator of Mass. v. Feeney, 442 U.S. 286 (1979) 16

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 21

Orr v. Orr, 440 U.S. 268 (1979) 16

Orsini v. Biasi, 423 U.S. 1042 (1976) 12

Oxley Stove Company v. Butler County, 166 U.S. 648 (1897) 5

Quilloin v. Walcott, 434 U.S. 246 (1978) 8,13

Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) 14

Reed v. Reed, 404 U.S. 71 (1971) 14,15, 16

Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 14

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) 17

Schlesinger v. Ballard, 419 U.S. 498 (1975) 15

Stanley v. Illinois, 405 U.S. 645 (1972) 13

Stanton v. Stanton, 421 U.S. 7 (1973) 16

Vorchheimer v. School District, 97 S.Ct. 1671 (1977) 15

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 16

Wengler v. Druggists Mutual Insurance Co., 446 U.S. 152 (1980) 16

Williamson v. Lee Optical, 348 U.S. 483 (1955) 14

United States Constitution

Fourteenth Amendment 1,2,6, 7,8,9, 10,11, 13,14, 16,24, 25,26, 28,29

Wisconsin Case

In the Interest of Baby Girl K., 113 Wis. 2d 429, __ N.W.2d ___ (1983). 4,9, 11,14, 18,20, 23,25, 28

Wisconsin Statutes

Sec. 48.415(1). 22

Sec. 48.415(2). 22

Sec. 48.415(3). 22

Sec. 48.415(4). 22

Sec. 48.415(5). 22

Sec. 48.415(6)(a)2. . . . . .1,3,4, 6,7,8, 9,10,11, 14,15,22, 23,24,25, 28

Sec. 48.415(6)(b) 9

Sec. 48.91(2)(b). 24

Other Authorities

Babcock, Freedman, Norton & Ross, The Evolution of New Constitutional Standards for Reviewing Discriminatory Classifications, Sex Discrimination and the Law (1975) 15

Gay, A conceptual framework of bonding JOGN NURS 440-444 (1981). 20

Henly, Nutrition across the woman's life cycle: special emphasis on pregnancy NURS CLIN NORTH AM 99-110 at 105 (1982) 20

Klaus & Kennell, Parent-Infant Bonding, at 65 (1982). 20

Nowak, Rotunda & Young, Constitutional Law at 607 (1978) 15

Malpica-Orsini v. Blasi, 36 N.Y. 2d 568, 331 N.E.2d 486 (1975) 12

R. Stern and E. Gressman Supreme Court Practice 163 (5th Ed. 1978),. 5

S.C.R. 16(1)(a)(b)(c) 1,4,5, 8,11, 13,28

INTRODUCTION

Appellant presents three issues to this Court on appeal:

1. Does Wisconsin Statutes section 48.415(6)(a)2 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by unjustly discriminating against unwed fathers?

2. Does Wisconsin Statutes section 48.415(6)(a)2, as applied, violate the rights of unwed fathers under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, since it was held that a father's rights can be terminated for action or inaction during the first five months of the mother's pregnancy?

3. Were appellant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution violated by a judgment terminating his parental rights to a child with whom he had not established a relationship, in the absence of an explicit finding of parental unfitness?

Appellee moves this Court to dismiss the appeal as to issues 2 and 3, because they were never properly raised in, or decided by, any Wisconsin court as required by S.C.R. 16(1)(b).

Appellee moves this Court to dismiss the appeal as to issue 1, on the grounds that it does not present a substantial federal question as required by S.C.R. 16(1)(b), and that the issue has already been adequately addressed and resolved by this Court.

Alternatively, appellee moves this Court summarily to affirm the Wisconsin decisions holding that Wis. Stat. s. 48.415(6)(a)2 does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States

Constitution, because the gender-based distinction employed by the statute is rational and is substantially related to important governmental objectives.

Appellee also, alternatively, moves this Court summarily to affirm the Wisconsin decisions, because the statute does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, because a putative father is given an opportunity to establish a substantial relationship with his child both before and after birth, and because the Due Process Clause does not require a finding of unfitness in order to terminate a putative father's parental rights when he has never established a substantial relationship with his child, and when such termination is in the best interest of the child.

STATEMENT OF FACTS

In June, 1980, L.K., appellee in this matter, became pregnant with Baby Girl K. L.K. was 15 years old at the time and unmarried. Approximately five months later B.B., appellant and putative father of Baby Girl K., was incarcerated at the Kettle Moraine Correctional Institution, in Plymouth, Wisconsin, on his second burglary conviction.

Baby Girl K. was born on March 17, 1981. On March 20, 1981, she was placed in a foster home where she has resided to this day. On March 25, 1981, the Marathon County Department of Social Services filed a petition for the voluntary termination of both parents' parental rights. Although appellant had initially consented to the termination of his rights, he subsequently changed his mind, and the petition was withdrawn. On August 3, 1981, appellant filed a petition for determination of paternity

and custody. On August 4, 1981, the Department of Social Services filed a petition for determination that the child was in need of protection and services, known in Wisconsin as a "CHIPS proceeding." On August 13, 1981, appellee filed a petition for termination of appellant's parental rights under Wis. Stat. s. 48.415(6)(a)2. All the above actions were consolidated.

On December 23, 1981, the trial court held that appellant had "failed to assume parental responsibility as set forth and defined in s. 48.415(6)(a)2 and subsection (6)(b)." In its Findings of Fact, the court found, among other things:

> (1) That appellant had failed to provide care or financial support for appellee and Baby Girl K., both during the pregnancy and after birth, even though he had had the opportunity and the ability to do so;
>
> (2) That appellant had failed to present any evidence of attempts on his part to establish a substantial parental relationship;
>
> (3) That appellant had physically assaulted appellee during her pregnancy;
>
> (4) That appellant had written to appellee while he was incarcerated and twice requested that she smuggle marijuana into prison for him;
>
> (5) That, if appellant's parental rights were terminated, there was a good chance that Baby Girl K. would be adopted by her foster parents.

The court found as a matter of law "[t]hat it is in the best interest of Baby Girl [K.] that the parental rights of her father, [B.B.], be terminated." See, Appendix C.

Appellant appealed to the Wisconsin Court of Appeals, and the judgment was affirmed. The Court of Appeals concluded that the evidence was sufficient to support a finding that appellant had had an opportunity to develop a substantial relationship with Baby Girl K. and had failed to do so. The Court of Appeals held that the trial court's finding that the termination of appellant's

parental rights would be in the best interest of Baby Girl K. was not against the great weight and clear preponderance of the evidence. The Court of Appeals further determined that a specific finding of parental unfitness was unnecessary to terminate appellant's parental rights, and that even though a finding of unfitness was not required, such a finding "is clearly sustained by the record." Finally, the Court of Appeals concluded that Wis. Stat. s. 48.415(6)(a)2 did not unconstitutionally deny appellant equal protection of the law. See, Appendix B.

Appellant next appealed to the Wisconsin Supreme Court which also affirmed the judgment. See, Appendix A: In the Interest of Baby Girl K., 113 Wis. 2d 429, ___ N.W.2d ___ (1983).

Appellant now appeals to the United States Supreme Court. James Kurth, Attorney at Law and Baby Girl K's Guardian ad Litem, joins appellee in her Motion to Dismiss or Affirm. See, Appendix D.

To date, Baby Girl K. has spent all but the first three days of her life with the foster parents who now seek to adopt her legally. Appellee has consented to this adoption. Appellant, who has never seen Baby Girl K. nor contributed to her support, and who has established no relationship with the child beyond a biological one, is the only individual preventing this adoption.

ARGUMENT

I. THE DUE PROCESS ISSUES WERE NOT PROPERLY RAISED IN ANY WISCONSIN COURT AS REQUIRED BY S.C.R. 16(1)(b).

Appellant, Bryon Buhse, attempts to invoke this Court's jurisdiction on appeal and presents the Court with three issues allegedly warranting briefing, oral argument,

and consideration by the Justices on the merits. Before the United States Supreme Court may invoke appellate jurisdiction to review a decision by a state court, certain conditions precedent must be met. A substantial federal question must be raised in a timely manner and in conformity with the state procedural rules. The state court must expressly rule on the federal question, and the court's judgment must not be capable of construction resting on adequate non-federal grounds. The federal question must then be ruled upon by the highest court in the state from which the appeal emanates. S.C.R. 16(1)(a),(b), and (c).

Appellee, Lisa Krueger, moves this Court to dismiss the present appeal as it relates to two of the three issues presented, on the grounds that the federal questions sought to be reviewed were not timely nor properly raised, and were not expressly acted upon in Wisconsin by the trial court, Court of Appeals, or Supreme Court, as required by S.C.R. 16(1)(b).

A. A Challenge On Federal Grounds Must Be Explicit.

" ... [I]t is necessary for appeal purposes that the litigant make specific and plain in the state court his contention that the application of the statute to his particular circumstances would make the statute void under federal law." R. Stern and E. Gressman, Supreme Court Practice, at 163 (5th Ed. 1978). It is not enough merely to refer to the "Constitution and Laws of the United States," Oxley Stove Co. v. Butler County, 166 U.S. 648 (1897), or "due process of law," Bowe v. Scott, 233 U.S. 658, 664-665 (1914); Brady v. Maryland, 373 U.S. 83, 91 (1967), or the "Constitution of the United States." Herndon v. Georgia, 295 U.S. 441, 442-443 (1935). "An attack upon a statute upon the ground that it is in